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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANNY SMITH,

Petitioner,

v.

STATE OF OHIO,

Respondent.

Supreme Court U.S.
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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

I. [A] man exiting a private residence, carrying a closed grocery bag 'gingerly' and then placing or even throwing the bag on the hood of his car as he turns to face a police officer, has done nothing that creates probable cause to arrest him. Absent the probable cause to arrest him or a warrant based upon probable cause, the officer had no authority to open the bag, which was 'seized' for Fourth Amendment purposes as soon as the officer pushed the defendant's arm away and grabbed the bag.

State v. Smith, 45 Ohio St. 3d 255, 275; 544 N.E.2d 239, 256 (1989)(Wright, J., dissenting).

II. The mere exiting from a house where suspected drug dealing might have occurred, without more, simply cannot be sufficient justification to stop and search someone and his possessions.

State v. Smith, 45 Ohio St. 3d 255, 271; 544 N.E.2d 239, 253 (1989)(Wright, J., dissenting).

III. [When] police officers, without sufficient objective facts concerning this particular defendant to raise any reasonable suspicion whatsoever, stopped the defendant to question him...[and]...with no probable cause to justify an arrest, and without the defendant's consent . . . searched a closed container belonging to the defendant...[and]...[b]ased upon what was found in the illegal search of the container, the officers arrested the defendant, the fruits of the search and seizure must be suppressed.

State v. Smith, 45 Ohio St. 3d 255, 270, 544 N.E.2d 239, 252-53 (1989)(Wright, J., dissenting)(emphasis in original).

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1. In turning the Chimel holding on its head, the majority, in essence, places all Ohio citizens under 'martial law' because under the majority's decision, a police officer may search one's person or personal property with impunity prior to placing the person under arrest. Such a rule of law is repugnant to a truly free and open society, and should never be countenanced by this court.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

DANNY SMITH
Petitioner,
v.
STATE OF OHIO
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

The petitioner, Danny Smith, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio entered in the above-styled proceeding on September 13, 1989.

OPINIONS BELOW

The Ohio Supreme Court granted jurisdiction and affirmed the judgment of the Fifth Appellate District, Ashland County Ohio. Due to errata in the official report, a copy of the Court's opinion, as reported in the North Eastern reporter, appears in the appendix to the Petition as Appendix E.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on September 13, 1989, and this petition was timely filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States which provide, in pertinent part:

FOURTH AMENDMENT

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction therof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .

STATEMENT OF THE CASE

On July 31, 1987, petitioner, Danny Smith, was indicted for one count of drug abuse, in violation of Ohio Revised Code 2925.11(A), a felony of the fourth degree.[1] Petitioner entered a plea of not guilty at his arraignment.

On August 13, 1987, petitioner filed a motion to suppress evidence, contending that all evidence against petitioner was obtained as a result of an illegal search and seizure and that all statements made by petitioner were the fruits of the illegal search. Following a suppression hearing, the trial court overruled appellant's motion. The opinion of the Ashland County Common Pleas Court is unreported but attached to this Petition as Appendix A.

Petitioner subsequently changed his plea from not guilty to no contest and preserved his right to appeal the denial of his motion to suppress. The court accepted the plea, found petitioner guilty, and sentenced him to one year's imprisonment. The Sentencing Journal Entry of the Ashland County Common Pleas Court is attached to this Petition and marked as Appendix B. Execution of sentence was suspended pending appeal.

Petitioner appealed the judgment to the Court of Appeals of Ashland County, Fifth Ohio Appellate District. He raised as error the trial court's overruling of his motion to suppress. The court

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[1] Ohio Revised Code 2925.11(A) and (C), Drug abuse, provide:
(A) No person shall knowingly obtain, possess, or use a controlled substance.
(C) If the drug involved is a compound, mixture, preparation or substance included in schedule I or II, with the exception of marihuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

Ohio Revised Code 2929.11(D)(2), Penalties for felonies, provides:
(D)(2) For a felony of the fourth degree, the term shall be six months, one year, or eighteen months.

of appeals found no error and affirmed petitioner's conviction. State v. Smith (March 29, 1988), Ashland County Court of Appeals No. CA-889, unreported. This opinion is attached to this Petition and marked as Appendix D.

Petitioner filed a Notice of Appeal to the Ohio Supreme Court. On September 13, 1989, the court, with three justices dissenting, affirmed the ruling of the trial and appellate courts, although on significantly different grounds. State v. Smith, 45 Ohio St. 3d 255, 544 N.E.2d 239 (1989). This decision is attached to this Petition and marked as Appendix E.

Following the decision of the Ohio Supreme Court, petitioner's bond was revoked. Petitioner is currently incarcerated.

A. **How The Federal Issues Were Raised And Decided Below**

Petitioner filed a Motion to Suppress in the Common Pleas Court of Ashland County. Petitioner moved the court for an order "suppressing all evidence against the defendant seized in violation of the Fourth Amendment", and suppressing all confessions, admissions or statements made as the result of the illegal search and seizure.

An evidentiary hearing was conducted on August 26, 1987. On September 8, 1987, the trial court overruled petitioner's motion to suppress, relying specifically on Florida v. Royer, 460 U.S. 491 (1983). The trial court ruled that "the initial encounter between the defendant and the police did not fall beneath the purview of Fourth Amendment protection and that the subsequent seizure and search of the defendant's personal property was not unreasonable, or in contravention of the defendant's Fourth Amendment rights." See Appendix A.

Petitioner filed a timely appeal, averring that "the trial

court erred prejudicially in overruling the appellant's motion to suppress evidence." On March 29, 1988, the Court of Appeals of Ashland County, Fifth Appellate District, affirmed the trial court. The Court of Appeals framed the issue as follows:

> The issue . . . before us . . . deals with the propriety of the arresting officers' encounter with appellant and the subsequent warrantless arrest. Appellant urges us that the officer did not have probable cause to stop him.

State v. Smith, supra, at 2, Appendix D.

The Court of Appeals rejected petitioner's contention that "Florida v. Royer, 460 U.S. 491 (1983) mandates a finding that the search was improper" and held "that the search and seizure of appellant's property was proper, and the subsequent statements were not fruits of the poisonous tree." State v. Smith, supra, at 5, Appendix D.

On April 6, 1988, petitioner appealed to the Ohio Supreme Court, asserting that the case involved a substantial constitutional question and presented a question of great public interest. Petitioner raised the following proposition of law in the Ohio Supreme Court:

> A Citizen May Refuse To Consent To Allow A Police Officer To Search A Bag When The Police Officer Has An Inarticulate Hunch That The Bag May Contain Contraband Because Any Bag May Contain Contraband. Refusing Consent To Search Does Not Provide Constitutionally Adequate Justification For Searching A Bag When A Citizen Is Forcibly Stopped For Investigation.

On September 13, 1989, a bitterly divided Ohio Supreme Court affirmed the decision of the Court of Appeals, albeit on significantly different grounds. Three justices concurred in the majority decision, one justice concurred in the judgment and three justices dissented. State v. Smith, 544 N.E. 2d 239, 45 Ohio St.3d 259 (1989). A copy of the decision as reported in the North Eastern Reporter is attached to this Petition and marked as Appendix E.

B. **Statement Of The Facts Material To The Consideration Of The Questions Presented.**

The plurality opinion of the Ohio Supreme Court discussed the relevant facts as follows:

> On the evening of June 19, 1987, Sergeant Geoff Thomas and Detective John L. Edwards, both employed by the Ashland Police Department, were preparing to go on a gambling raid. Before the gambling raid operation began, the officers drove their car through the streets of the area.
>
> While doing so, the officers observed two males, Danny Smith, appellant herein, and Steven Holmes, leaving the residence of Wilma Balducci.[2] Smith was holding in his hand a brown sack, commonly used to carry groceries, which was folded closed at the top. The officers described his method of carrying the sack as 'gingerly.'[3] Neither officer knew either of the two men.
>
> After exiting the Balducci residence and walking down the street, while being observed by the officers, appellant and his companion entered the parking lot of a nearby YMCA and walked toward a vehicle parked in the lot. The officers, meanwhile, turned into the parking lot and pulled up behind the vehicle that appellant had approached.
>
> Thomas exited the unmarked police vehicle from the passenger side and started to approach appellant, asking appellant to "* * * come here a minute." Appellant did not respond and kept walking. At that point, Thomas identified himself as a police officer. Appellant, who was by now alongside the car near the front of the driver's side door, threw the sack he was carrying onto the hood of the car and turned to face Thomas who was

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[2] In Part II of the Ohio Supreme Court opinion, the plurality noted the two officers testified that Wilma Balducci had a conviction for forgery and was presently on probation. They further testified that six months earlier, the Ashland County Sheriff's Department had executed a warrant to search the Balducci residence and drug paraphernalia had been found. In addition, Thomas testified he had received recent tips from informants that Balducci had been dealing in drugs and neighbors of Balducci had complained of heavy traffic in and out of her residence. Smith, at 262, 544 N.E.2d at 245.

[3] Officer Thomas described the bag as a "full-size grocery-size grocery bag. It has Kash N Karry printed on the side and also 'Loaded With Low Prices' on the side." (Tr. at 12-13)
Officer Thomas further noted that "[h]e was carrying it -- the top was rolled up, and he was carrying it so it was hanging down to his side. It wasn't swinging. It was just kind of a level-type carry." Tr. at 13, Appendix F.

> approaching appellant. Thomas continued walking toward the car and sack, and the officer aksed appellant what the sack contained. Appellant did not respond. As Thomas reached for the sack, appellant tried to block Thomas' hand. Thomas pushed appellant's hand away, opened the sack and ascertained its contents.[4] He discovered a four-beam scales, a weighing pan bearing a white powder residue, later determined to be cocaine, and a piece of paper used to package cocaine, commonly referred to as a "coke seal." Thomas then asked appellant how much cocaine was in the sack. According to Thomas, appellant replied that the sack contained about two grams of cocaine.
>
> Thereupon, appellant was advised that he was under arrest and was transported to the police station. Appellant was given Miranda warnings and subsequently chose to make a statement. Appellant admitted the scales, cocaine and cocaine seal were his.

State v. Smith, 45 Ohio St. 3d 255, 256; 544 N.E.2d 239, 240.

Based upon these facts, the Ohio Supreme Court concluded that (1) "[n]o seizure of [petitioner's] person, within the meaning of the Fourth Amendment, occurred in this case" prior to petitioner's arrest, Smith, at 260, 544 N.E.2d 243-44 (Part I of the decision);

---

[4] The testimony of Sergeant Thomas was as follows:

Q. From the position that you pulled your car into that lot, did you block Danny Smith's exit from his vehicle?
A. No.
Q. From the moment you got out of that car, it was your intention to go for that bag, wasn't it?
A. It was my intention to get Danny Smith to stop.
Q. Why?
A. To ask him what was in the bag.
Q. Why did you want to ask him what was in the bag?
A. To see if he would answer me.
Q. And what if he didn't?
A. Then I wouldn't have had much choice.
Q. But he didn't give you permission to look in the bag, did he?
A. Not verbally, no.
Q. Not physically, either, because he attempted to block you from grabbing his bag, did he not?
A. He did attempt to block me.
Q. Notwithstanding that, you grabbed the bag anyhow, and you proceeded to look inside it?
A. That's correct.

Tr. at 41-42, Appendix F.

All seven members of the Ohio Supreme Court agreed that "appellant had not voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question. . . " Smith, supra, at 263, n.6, 544 N.E.2d at 246. See also, Smith, at 266, 544 N.E.2d at 249 (Sweeney, J., dissenting).

(2) "[t]he officers' suspicions here were clearly articulated at the suppression hearing, and were supported by objective facts" and therefore "the seizure of appellant's bag was reasonable under the Fourth Amendment," Smith, at 263, 544 N.E.2d at 246 (Part II of the decision); and (3) "the search of appellant's bag contemporaneous with his arrest was justified by the need to prevent the destruction of evidence of the crime," Smith, at 263, 544 N.E.2d 246 (Part III of the decision). Thus, in the words of the Supreme Court of Ohio, no seizure, let alone arrest, had occured; yet the search was proper as incident to the arrest.

The court concluded by stating:

> The search here was neither remote in time nor place from appellant's arrest. Furthermore, the bag was still within appellant's easy reach. Although Thomas lawfully seized the bag, he had not--at the time appellant reached out in attempt to prevent such seizure--reduced the bag to his 'exclusive control.' The danger of appellant obtaining the bag and destroying all or part of its contents was still present, and thus the search was warranted.

State v. Smith, 45 Ohio St. 3d at 264, 544 N.E.2d at 247.

REASONS FOR GRANTING THE WRIT

1. In turning the Chimel holding on its head, the majority, in essence, places all Ohio citizens under 'martial law' because under the majority's decision, a police officer may search one's person or personal property with impunity prior to placing the person under arrest. Such a rule of law is repugnant to a truly free and open society, and should never be countenanced by this court.

State v. Smith, 45 Ohio St. 3d 255, 267; 544 N.E.2d 239, 249 (1989)(Sweeney, J., dissenting).

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to

be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

"Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable--subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, (1967). "By its opinion today, the majority has not only misconstrued the precedents it cites to supposedly support its untenable ruling, but it has ignored the clear language of the federal...guarantees of freedom from unreasonable or unlawful searches and seizures as embodied in the Fourth Amendment to the United States Constitution." State v. Smith, at 264-5, 544 N.E.2d 247-48 (1989) (Sweeney, J., dissenting).

Ultimately, the majority relied on Chimel v. California, 395 U.S. 752 (1969) and United States v. Chadwick, 433 U.S. 1, (1977) to support its conclusion that the search of petitioner's grocery bag was incident to his arrest. While the Ohio Supreme Court took great pains to find the officer had a "reasonable" suspicion to stop petitioner and seize the grocery bag, nowhere does the majority find probable cause to arrest until the contents of the grocery bag were disclosed. "Of crucial relevance to the instant case is the fact that the appellant's property was searched and seized prior to his arrest." State v. Smith, at 265, 544 N.E.2d at 248 (Sweeney, J., dissenting)(emphasis in original). The seized property then furnished the sole basis for the arrest. "...[N]one of [the cases relied upon by the majority] held that the circumstances providing justification for the original stop were sufficient to establish the probable cause necessary to arrest the suspects or to search the [grocery bag]." State v. Smith, at 272-73, 544 N.E.2d at 254-55 (Wright, J., dissenting)(emphasis in original).

A search made without a warrant cannot be justified as an incident of arrest unless the arrest is lawful. Johnson v. United States, 333 U.S. 9 (1947). The Court's admonition in Johnson is pertinent to this case:

> [T]he Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters [or personal effects] under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law and the police-state where they are the law.

Johnson, at 16-17.

Officer Thomas wanted to look in the grocery bag carried by the petitioner despite the fact that he knew adequate grounds to stop and search did not exist. Officer Edwards testified:

> Q. Did [Sgt. Thomas] indicate to you that if the Defendant didn't respond as to what was in the bag whether or not he intended to arrest him?
>
> A. He couldn't arrest him.
>
> Q. Did he say that to you, or did you two discuss that?
>
> A. He said if he walks then he walks.

Tr. at 61, Appendix F.

Sgt. Thomas further testified:

> Q. Sergeant Thomas, was it your intent, had the Defendant ignored your request to stop, kept his grocery bag and gone in the car, to arrest the Defendant at that time?
>
> A. If Mr. Smith would have got into his car and left, there really wouldn't have been a whole lot I could have done. I couldn't have arrested. I wouldn't have had grounds at that point.
>
> Q. Have you had any discussion specifically with Detective Edwards about what you were going to do in the event he did get in the car and pull away?

A. ...Detective Edwards says what if he doesn't let you look in the bag? I said, Oh well. Then he walks.

Tr. at 32, Appendix F.

Despite the lack of adequate grounds, Sgt. Thomas searched anyway. Detective Edwards testified:

Q. Picking up from the point where the bag has been thrown and the Defendant has backed away from the bag, what did anybody say next or do next?

A. Sergeant Thomas approached the bag, and he was -- he reached to look into the bag, and Danny Smith put his hand in front of Sergeant Thomas, about here on he chest, being like this.

Sergeant Thomas deflected him away from him. Told him just to say, you know, just stay where he was.

Q. After he had deflected the Defendant's attempt to stop him from reaching for the bag, what did Thomas do then?

A. He looked into the bag.

Q. What conversation, if any, do you remember next?

A. Sergeant Thomas was looking into the bag. Danny Smith said, It's just a set of scales.

Tr. at 59, Appendix F .

The street encounter that occurred in Sibron v. New York, 392 U.S. 40, (1968) is similar to what occurred in Petitioner's case:

> [I]t is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolmen Martin accosted him in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him. He merely saw Sibron talking to a number of known narcotics addicts over a period of eight hours. It must be emphasized that Patrolman Martin was completely ignorant regarding the content of these conversations, and that he saw nothing pass between Sibron and the addicts. So far as he knew, they might indeed "have been talking about the World Series." The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an

> individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. E.g., Henry v. United States, 361 U.S. 98, (1959); Johnson v. United States, 333 U.S. 10, 16-17, (1948). Thus the search cannot be justified as incident to a lawful arrest.

Sibron, at 62-3. Justice Sweeney protested: "[I]t takes no citation of authority to understand that an illegal search is an illegal search regardless of whether the fruits recovered as a result are illegal drugs or everyday grocery products." State v. Smith, at 267, 544 N.E.2d at 250. (Sweeney, J., dissenting).

> 2. The majority's tortuous path used to arrive at what appears to be a predetermined result is filled with misinterpretations of the state of the law as announced by the United States Supreme Court concerning the validity of any search and seizure.
>
> State v. Smith, at 265, 544 N.E.2d at 248 (1989)(Sweeney, J., dissenting).

Justice Sweeney challenged "the majority to name one United States Supreme Court case that permits an officer to conduct a search of personal property without a warrant, and then arrest the person based on the fruits of the warrantless/illegal search. Of course, no holding based on facts similar to the instant cause has been upheld by the Unted States Supreme Court because such a holding would totally fly in the face of the precise language of the Fourth Amendment." Id. at 266, 544 N.E.2d at 249 (Sweeney, J., dissenting).

The Ohio Supreme Court relied upon Florida v. Royer, 460 U.S. 491 (1983), United States v. Mendenhall, 446 U.S. 544 (1980), and Terry v. Ohio, 392 U.S. 1 (1968), to find petitioner was not seized under the Fourth Amendment. Petitioner does not necessarily dispute this finding; neither is it dispositive of the case. While the officer may not have seized petitioner for Fourth Amendment

purposes, neither had petitioner been divested of his Fourth Amendment right to be secure in his "person, house, papers and effects."

Sgt. Thomas exited his unmarked vehicle and requested petitioner to stop. When petitioner did not respond immediately, Sgt. Thomas identified himself as a police officer. Petitioner set his grocery bag on the hood of his car and turned to face the officer. When the officer asked what was in the bag, petitioner did not respond but attempted to stop the officer from searching his grocery bag.

While petitioner did eventually stop in response to the police officer, he was under no obligation to stop, to respond to the officer's questions, or to give the officer his property.

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Florida v. Royer, 460 U.S. 491, 497-8 (1983)(citations omitted).[5]

After determining there was no seizure of the person, the Ohio

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[5] Surprisingly, the concurring opinion in State v. Smith, supra, disputes that citizens are "...free to ignore the officers' commands because the officers did not display their weapons, did not physically touch appellant, and did not use a threatening tone of voice or order appellant into the cruiser." Smith, at 264, 544 N.E.2d at 247 (Douglas, J., concurring).

"My point in writing is that I do not believe the highest court of this state should be saying in writing that citizens are free to ignore the orders of police officers just because the officer has not taken one of the actions described in the majority opinion. For us to give judicial approval to this is naive at best--and could be disastrous at worst." Id. (Emphasis added)

Supreme Court then held the seizure of the grocery bag was consistent with United States v. Place, 462 U.S. 696 (1983). In Place, this Court held that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the officer may detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. In Place, reasonable suspicion permitted a brief detention of luggage to investigate further by subjecting the luggage to a canine sniff. Initially, this Court held that a ninety minute detention of luggage for further investigation was unreasonable. This Court further held that once alerted by the dog to the presence of contraband in the luggage, a three day delay in securing a search warrant in order to search the luggage was also unreasonable.

In petitioner's case, the majority of the Ohio Supreme Court determined that the detention of the grocery bag was reasonable under Place and subject to search under Chimel. Unlike Place, however, this determination was not based on any reasonable suspicion. Unlike Place, this case does not involve a temporary detention "for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion." Place, at 702. Unlike Place, this case does not involve a detention of effects in order to obtain a warrant.

> [T]his case involves the citizens of Ohio as they walk around their own neighborhoods. Moreover, the facts in this case do not even satisfy the rationale and requirements found in the airport search cases. In Royer, supra; Untied States v. Mendenhall (1980), 446 U.S. 544; United States v. Place (1983), 462 U.S. 596; and United States v. Sokolow, supra, the officials did not initiate the stop for questioning of any of the defendants on as flimsy a factual record as here. There were many more articulable facts to support each of the initial stops. Most significant is the fact that none of these cases held that the circumstances providing justication for the original stop were sufficient to establish the probable cause necessary to arrest the suspects or to search

[the] luggage.

State v. Smith, at 272-73, 544 N.E.2d at 254-55 (Wright, J., dissenting).

If the investigative procedure is itself a search requiring probable cause, the initial seizure of the property, no matter how brief, cannot be justified on less than probable cause. See Place, at 706.

> 3. While we as a society must endeavor to deal with the scourge of illegal drugs in a quick and effective manner, we must never sanction a solution that dispenses with the constitutional guarantees and personal liberties that have made ours the most enduring government on the face of the Earth.

State v. Smith, at 268, 544 N.E.2d at 250 (1989)(Sweeney, J., dissenting).

Justice Wright eloquently criticized the holding of the majority when he wrote:

> We are facing a plague in our land as a result of drug abuse. The reaction of our leaders to this plague has been dramatic and in the main appropriate. However, the stability of American society rests on the fact that we are a nation of laws. The courts are sworn to defend our most fundamental laws - the state and federal Constitutions.
>
> The majority well nigh concedes that appellant's Fourth Amendment rights were violated, but shrugs this intrusion off because of the greater value of stern law enforcement with respect to the war against trafficking in dangerous drugs. Such an approach is foreign to sound constitutional jurisprudence. I would point to the true rule regarding the adherence to constitutional principles as expressed in Ex parte Milligan, 71 U.S. (4 Wall.) 2 (footnote omitted), which was decided in the context of national peril and public unrest far greater than exists today. In refusing to ignore the force and effect of the plain English words used by our ancestors in framing the Constitution and the provisions of the Bill of Rights in particular, the United States Supreme Court stated:
>
> "* * * Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers

and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." (Emphasis added). Id. at 120-121.

* * *

The Fourth Amendment is but one of the ten amendments consitututing the Bill of Rights. The securities for personal liberty embodied in the Bill of Rights "were such as wisdom and experience had demonstrated to be necessary for those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified."Ex parte Milligan, supra, at 120.

* * *

Into these provisions were poured the living and sometimes bitter experiences of our forefathers struggling for independence from an unyielding and unfeeling despot. They realized the inherent temptation and persistent dangers of power. The simple words of the Fourth Amendment have an everyday importance and application that is as valid today as it always has been.

" 'We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to the constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.'" Chimel v. California (1969), 395 U.S. 752, 761 (quoting McDonald v. United States [1948], 335 U.S. 451, 455-456.

> "'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" Mincey v. Arizona (1978), 437 U.S. 385, 395 (quoting Johnson v. United States [1948], 333 U.S. 10, 13-14).
>
> Finally, the Fourth Amendment applies to "people, not places," Katz v. United States (1967), 389 U.S. 347, 351, and absent some special exception all containers and packages in one's possession will receive full protection of the Fourth Amendment. United States v. Ross (1982), 456 U.S. 798, 822. So, when defendant Smith walked out of a private residence, during daylight on a summer evening, carrying a paper grocery bag, he was shielded by the protections of the Fourth Amendment, and the burden is on the state to show the need to search defendant's bag without a warrant to do so. United States v. Jeffers (1951), 342 U.S. 48, 51.
>
> The fact that defendant was merely carrying a grocery bag at his side with the top rolled down does not invalidate his privacy interest in that container. The central purpose of the Fourth Amendment forecloses distinctions between types of containers. "For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler [or anyone else] who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case." (Footnote omitted.) United States v. Ross, supra, at 822.

Smith v. State, at 268-270, 544 N.E.2d at 251-52 (Wright, J., dissenting).

The police officers in this case "did not know the defendant or his companion who were merely exiting a private residence on a June evening when it was still light. The only 'suspicious' behavior was the defendant's carrying of a grocery bag while exiting from a residence where the authorities suspected drugs had been sold on an undefined former date. The mere exiting from a house where suspected drug dealing might have occurred, without more, simply cannot be sufficient justification to stop and search someone and his possessions. To hold otherwise destroys almost everyone's right to privacy in his or her person." State v.

Smith, at 271, 544 N.E.2d at 253 (Wright, J., dissenting).

The majority went to great lengths to chronologically compartmentalize the confrontation. The majority attempts to justify the conduct by dividing a single course of conduct taking place over a very brief period of time into a series of extended temporal units. However, the conduct is not that complicated. The officers pulled up behind Smith, walked up to him, pushed him aside and searched his effects. In the final analysis, the majority opinion fails to account for the lack of probable cause.

Justice Scalia observed in Arizona v. Hicks, 480 U.S. 321, 329 (1987):

> Justice Powell's dissent reasonably asks what it is we would have had Officer Nelson do in these circumstances. . . The answer depends, of course, upon whether he had probable cause to conduct a search . . . If he had, then he should have done precisely what he did. If not, then he should have followed up his suspicions, if possible, by means other than a search - just as he would have had to do if, while walking along the street, he had noticed the same suspicious stereo equipment sitting inside a house a few feet away from him, beneath an open window. It may well be that, in such circumstances, no effective means short of a search exist. But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.

If certiorari is denied, Stone v. Powell, 428 U.S. 465 (1976) forecloses further review of this case. Thus, it is imperative to Danny Smith and the citizens of Ohio for this case to be reviewed. "[I]n essence, [this case] places all Ohio citizens under 'marital law'." Smith, 45 Ohio St. 3d at 267, 544 N.E. 2d at 249. "[L]aw enforcement concerns are especially strong in airports . . . However, this case involves the citizens of Ohio as they walk around their own neighborhoods."[6] Smith, 45 Ohio St.3d at 272, 544

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[6] In fact, the arresting officer testified at the suppression hearing concerning the suspicious nature of the grocery bag that he "[h]ad several investigations where marijuana has been delivered in paper bags. Another time was on a traffic stop on Claremont Avenue A young man had marijuana inside a paper bag. A lot--they're not always brown paper bags of that nature. A lot of times

N.E.2d at 254 (Wright, J., dissenting)(emphasis in original).

Justice Sweeney exposed the deficiencies of the majority's holding:

> The 'ends justifies the means' analysis employed by the majority should not be endorsed by this court at the expense of fundamental liberties that are to be enjoyed by all the citizenry. The rights embodied in the Fourth Amendment are much too precious to be tossed aside merely to sustain the conviction rendered below. While we as a society must endeavor to deal with the scourge of illegal drugs in a quick and effective manner, we must never sanction a solution that dispenses with the constitutional guarantees and personal liberties that have made ours the most enduring government on the face of the Earth.

State v. Smith, at 268, 544 N.E.2d at 250 (Sweeney, J., dissenting).

---

you'll get the fast-food places, those type of bags. Lunch bags. Any kind of bag that you can't see through" Tr., Motion to Suppress, at 14-15 (Appendix F).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio. Should the Court decide that plenary review is unnecessary in view of the clear conflict between the judgment of the Ohio Supreme Court and this Court's prior decisions, petitioner alternatively requests that the Court summarily reverse the judgment of the Ohio Supreme Court.

Respectfully submitted,

MAX KRAVITZ
Counsel of Record
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(614) 445-8823

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served on respondent State of Ohio by forwarding a copy to the office of its counsel, Robert P. DeSanto, Prosecuting Attorney, Ashland County, Suite #307, Orange Tree Square, Ashland, Ohio 44805, by U.S. Mail this 13th day of November, 1989. I further certify that all parties required to be served have been served.

Max Kravitz
Counsel for the Petitioner

Cockley

IN

IN THE COURT OF COMMON PLEAS OF ASHLAND COUNTY, OHIO

STATE OF OHIO, 87 SEP -8 AM 9:04 Case No. 6291

Plaintiff, JUANITA K. WRIGHT CLERK OF COURTS ASHLAND CO. OHIO

vs.

DANNY E. SMITH, :

Defendant. : JUDGMENT ENTRY

This case came on for hearing this 26th day of August, 1987, on the Defendant's written Motion to Suppress. The Defendant was present in open court represented by Attorney Stephen Cockley. The State of Ohio was present in open court represented by Assistant Prosecutor Ramona J. Rogers.

Whereupon, testimony was taken and evidence presented regarding matters relevant to the Defendant's Motion to Suppress.

Whereupon, after consideration of the evidence, the arguments of counsel, cited case law and specifically, Florida v. Royer, 460 US 491 (1983), the Court hereby FINDS, based upon the totality of the circumstances and facts as set forth in the Court's FINDINGS OF FACTS, which is ORDERED incorporated as if fully rewritten herein, that the initial encounter between the Defendant and police did not fall beneath the purview of Fourth Amendment protection and that the subsequent seizure and search of the Defendant's personal property was not unreasonable, or in contravention of the Defendant's Fourth Amendment rights. Consequently, the Court further FINDS that the evidence against the Defendant and the statements made by the Defendant to police are not fruits of an illegal search.

Based upon the aforementioned and the Court's FINDINGS OF FACTS, the Court further FINDS that the Defendant's Motion to Suppress is not well taken and should be, and hereby is, overruled.

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PROSECUTING ATTORNEY
SUITE 307
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ASHLAND, OHIO 44805
(419) 289-8937

Robert E. Henderson
JUDGE, COMMON PLEAS COURT

APPROVED:

Stephen Cockley
STEPHEN COCKLEY
Attorney for Defendant

Ramona J. Rogers
RAMONA J. ROGERS
Assistant Prosecutor

ROBERT P. DeSANTO
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IN

IN THE COURT OF COMMON PLEAS OF ASHLAND COUNTY, OHIO

87 AUG 31 PM 1:59

JUANITA KNIGHT
CLERK OF COURTS
ASHLAND CO. OHIO

STATE OF OHIO, : Case No. 6291

Plaintiff, :

vs. :

DANNY E. SMITH, :

Defendant. : FINDINGS OF FACT

Pursuant to Rule 12(E) of the Ohio Rules of Criminal Procedure, the Court hereby makes the follcwing findings of fact based upon the testimony and evidence presented during the hearing of August 26, 1987, on the Defendant's Motion to Suppress:

1. On June 19, 1987, Detectives Thomas and Edwards of the Ashland City Police Department observed the Defendant and a male companion exit the residence of Wilma Balducci, and proceed to a car parked in a YMCA parking lot. The Defendant was carrying a grocery bag in his hand;
2. The initial exchange between Sgt. Thomas and the Defendant was not a police-citizen encounter governed by Fourth Amendment standards and did not constitute a seizure, as the Defendant was free to not respond to police and go on his way;
3. During the initial exchange between Defendant and police, the police did not physically touch the Defendant, they did not display their weapons or use language or tone of voice indicating anything was mandated of the Defendant;
4. When Sgt. Thomas identified himself as a police officer,

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the Defendant threw the brown grocery bag away from himself and onto the hood of his car and stepped backwards away from the bag;

5. Once the Defendant committed the acts described in paragraph 4 above, a reasonable suspicion existed that the bag contained seizable items;

6. The Defendant physically attempted to block Sgt. Thomas from reaching for the grocery bag;

7. The Defendant and his male companion were in close proximity to at least 3 automobiles at the time of the encounter with police;

8. When Sgt. Thomas opened the brown grocery bag, he found a four-beam scale, residue on the scales' weighing tray and a cocaine seal;

9. When the Defendant was asked by Sgt. Thomas how much cocaine he had in the bag, the Defendant replied "about 2 grams";

10. After being transported to the police department and subsequent to being advised of his Miranda rights the Defendant admitted that the grocery bag plus contents belonged to him.

Robert E. Henderson
JUDGE, COMMON PLEAS COURT

Appendix B2

IN

IN THE COURT OF COMMON PLEAS OF ASHLAND COUNTY, OHIO

STATE OF OHIO, 87 SEP 18 AM 8:04 Case No. 6291

Plaintiff,

vs.

DANNY E. SMITH, :

Defendant. : JOURNAL ENTRY

This matter came on for a change of plea this 9th day of September, 1987, the Defendant being present in open court represented by Attorney Stephen Cockley. The State of Ohio was present represented by Assistant Prosecutor Ramona J. Rogers.

Whereupon, the Defendant, through his attorney, requested to withdraw his former plea of not guilty and enter a plea of no contest subject to the Court accepting said plea of no contest to the following charge:

COUNT ONE: DRUG ABUSE, in violation of Section 2925.11(A), Ohio Revised Code, a felony of the fourth degree.

Whereupon, the Court explained to the Defendant his Constitutional Rights including those rights enumerated in the Ohio Criminal Rule 11, and that by entering a plea of no contest, the Defendant was waiving those rights.

Whereupon, based upon the Court's inquiry of and explanation to the Defendant, the Court finds the Defendant's plea of no contest to be voluntarily, and understandingly made, and the Court hereby accepts said plea of no contest and finds the Defendant guilty of the above stated charge.

Whereupon, the Court proceeded to sentencing in this matter.

Whereupon, the Court addressed the Defendant personally and asked him if he wished to make a statement in his own behalf or present any information in mitigation of punishment, which he did not.

Whereupon, prior to imposing sentence the Court afforded the defense counsel an opportunity to speak on behalf of the Defendant, which he did not.

ROBERT P. DeSANTO
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ASHLAND, OHIO 44805
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SEP 18 1987

Appendix C1

XQ-33
14-16

Whereupon, the Defendant having plead guilty to COUNT ONE: DRUG ABUSE, in violation of Section 2925.11(A) of the Ohio Revised Code, a felony of the fourth degree, the Court hereby ORDERS AND DECREES that the Defendant be sentenced as follows:

As stated in Count One for the offense of Drug Abuse, in violation of Section 2925.11(A) of the Ohio Revised Code, a felony of the fourth degree, the Defendant is sentenced to one (1) year of incarceration at the Ohio State Reformatory in Mansfield, Ohio. The Defendant is to receive credit for all time served in the Ashland County Jail, which to date is zero (0) days, and is to receive one (1) day's credit for each day served subsequent this entry while he is awaiting transfer to the receiving institution.

The Clerk of Courts is directed at the appropriate time, to issue a warrant of conveyance to the Ashland County Sheriff directing him to forthwith deliver the Defendant to the Ohio State Reformatory in Mansfield, Ohio.

Costs in the amount of $_____ are taxed to the Defendant and in addition to these costs, the Defendant is taxed a sum of $8 pursuant to Section 2949.091 of the Ohio Revised Code. In addition, the $20 previously posted with the Clerk of Courts is to be paid over to the Treasurer of the State of Ohio, pursuant to Section 2743.70 of the Ohio Revised Code.

Whereupon, the Defendant, by and through counsel, moved the Court for the suspension of the execution of the Defendant's sentence and the continuance of bond pending the filing of an appeal.

Whereupon, the Court hereby grants the Defendant's oral motion to suspend the execution of sentence for a period of time sufficient for the Defendant to file his appeal. As a condition of said suspension, the Defendant is ORDERED to execute and post with the Clerk of Courts his own recognizance bond.

ROBERT P. DeSANTO
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COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John R. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Earle E. Wise, J.
	:	Hon. Ira G. Turpin, J.
vs.	:	
	:	Case No. CA-889
DANNY E. SMITH	:	
	:	
Defendant-Appellant	:	O P I N I O N
	:	

CHARACTER OF PROCEEDING: Criminal Appeal from Common Pleas Court, Case No. 6291

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee:

ROBERT P. DeSANTO
Prosecuting Attorney for
Ashland County, Ohio
Suite 307
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Ashland, Ohio 44805

For Defendant-Appellant:

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13 Park Avenue West
Mansfield, Ohio 44902

STEPHEN COCKLEY
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13 Park Avenue West
Mansfield, Ohio 44902

TURPIN, J.

This is an appeal from a felony conviction for drug abuse. Appellant originally plead not guilty and moved to suppress all physical evidence on the grounds that it was obtained as a result of an illegal search and seizure, and all statements made by appellant as fruits of the illegal search and seizure. After the trial court overruled the suppression motion, appellant changed his plea to no contest. He now appeals assigning as sole error:

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED PREJUDICIALLY IN OVERRULING THE APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

The issue before the trial court upon the motion, and before us on review, deals with the propriety of the arresting officers' encounter with appellant, and the subsequent warrantless arrest. Appellant urges us that the officer did not have probable cause to stop him. The facts are interesting, and illuminating.

Two plain clothes Ashland City Police Officers observed appellant and another man leaving a house which they knew was owned by one Wilma Balducci. The officers were on route to another assignment, and were not specifically keeping the house under surveillance. They knew, however, that the occupants of the house were suspected of trafficking in drugs, and also knew that an earlier raid on the house had been conducted by the Ashland County Sheriff's Department which had netted drug

paraphernalia. The city police had not participated in that raid. Appellant was observed carrying a heavy paper bag "gingerly." The officers accosted the two men in a parking lot and asked appellant what he had in the bag. (At the motion hearing, the officer testified that in his years in law enforcement it was his experience that contraband was often carried in the manner appellant was then employing, but that at the time he first spoke to him, the officer did not feel that he had probable cause to detain appellant if he did not stop of his own accord). The officer at this time identified himself as a law officer, but did not display his weapon. Appellant continued to walk to his car, then threw the bag onto the hood of the car and stepped back away from the bag. The officer approached, again asking what was in the bag, and reaching for it. Appellant attempted to prevent the officer from picking up the bag but the officer deflected him and took possession of the sack. The officer looked into the bag and saw therein a beam scale with white residue in the weight pan. Appellant then told the officer it was just a set of scales. Upon the officers asking how much cocaine was in the bag, appellant replied "about 2 grams." Upon further examination, the bag contained, besides the scales, a cocaine "seal" containing 3.1 grams of cocaine.

Appellant urges us that he had a reasonable expectation of privacy in the bag and did not consent to the officer's search. He argues that the U.S. Supreme Court's decision in Florida v. Royer (1983), 460 U.S. 491, mandates a finding that the search was improper. We do not agree.

In Royer, the defendant was approached in a airport concourse and his airplane ticket and identification was seized. He offered no objection to the search of his luggage, which was found to contain quantities of marijuana. The Supreme Court found on these facts that officers did not have reason to detain Royer and therefore the subsequent search was not voluntary. Royer was not free to leave because the officers retained his identification and his airplane ticket.

The case at bar is not like Royer at all. Here, appellant was not detained by the officers. He was free to get into his auto and drive away with his paper bag intact. A citizen-police encounter in which the police merely ask questions does not violate the Fourth Amendment, U.S. v. Mendenhall (1980), 446 U.S. 544. Instead of leaving, appellant stopped and attempted to disassociate himself from the bag and its contents. Far from retaining his expectation of privacy in the bag, he threw it upon the hood of the auto and stepped away from it. The trial court correctly found that at that point the situation which presented itself to the experienced officer was one of reasonable suspicion that the bag did contain seizable items. Appellant's subsequent efforts to stop the search only enhanced the probable cause to examine the bag and its contents.

We find that the search and seizure of appellant's property was proper, and the subsequent statements were not fruits of the poisonous tree. For that reason, the assignment of error is overruled, and the judgment of the trial court is affirmed. This cause is remanded to that court for execution of sentence.

Hoffman, P.J. concur
Wise, J.

IGT/lb

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JUDGES

violated DR 5-105(B)[1] and recommended that he be publicly reprimanded. The board adopted this finding and recommendation.

Day, Ketterer, Raley, Wright & Rybolt, Alicia M. Wyler, Coury, Burns, Demchak, Slagle & Lacki, Thomas A. Burns and D. Stephen Stone, Jr., for relator.

Charles W. Kettlewell, for respondent.

PER CURIAM.

We agree with the board's finding and recommendation and publicly reprimand respondent.

Costs taxed to respondent.

Judgment accordingly.

MOYER, C.J., and SWEENEY, HOLMES, DOUGLAS, WRIGHT, HERBERT R. BROWN and RESNICK, JJ., concur.

45 Ohio St.3d 255

The STATE of Ohio, Appellee,

v.

SMITH, Appellant.

No. 88-826.

Supreme Court of Ohio.

Submitted April 12, 1989.

Decided Sept. 13, 1989.

Defendant was convicted of drug abuse by the Court of Common Pleas, Ashland County, and defendant appealed. The Court of Appeals, Ashland County, affirmed trial court's overruling of defendant's motion to suppress and appeal was again taken. The Supreme Court, Holmes, J., held that: (1) encounter between defendant and police officer did not constitute "seizure"; (2) police officer had articulable suspicion that brown paper bag carried by defendant contained contraband to warrant seizure of bag; and (3) contemporaneous search of bag with arrest of defendant was proper.

Affirmed.

Douglas, J., filed opinion concurring in judgment.

Sweeney and Wright, JJ., filed dissenting opinions in which Brown, J., joined.

1. Arrest ⇐68(4)

No "seizure" of person of defendant occurred by police officers prior to discovery of contraband and defendant's subsequent arrest; at time police officer approached defendant, defendant had not been threatened with arrest, no weapon had been displayed to him, police officer's cruiser was not blocking his exit from parking lot, and defendant was not physically touched by police officers. U.S.C.A. Const. Amend. 4.

2. Searches and Seizures ⇐23

In general, seizure of personal property is considered per se unreasonable under Fourth Amendment unless it follows from judicial warrant issued upon probable cause and particularly describing item to be seized. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐30, 42

Absent warrant, but where law enforcement officials have probable cause to believe that container holds contraband or evidence of crime, item may be seized, pending issuance of warrant to search, if exigencies of circumstances demand it or some other recognized exception to warrant requirement is present. U.S.C.A. Const.Amend. 4.

4. Drugs and Narcotics ⇐184(5)

Police officer possessed sufficient objective facts to support particularized articulable suspicion that bag carried by defendant contained contraband; defendant was found exiting house in which drug paraphernalia had previously been found pursu-

1. Erroneously denoted DR 5-101(B) in the panel's and board's reports.

ant to earlier search, police officers received recent tips that owner of house had been dealing in drugs, defendant was seen leaving house with closed grocery bag, and when police approached defendant to investigate, defendant abruptly disassociated himself from bag as he threw bag onto hood of car and backed away from it. U.S. C.A. Const.Amend. 4.

5. Searches and Seizures ⇐28

Defendant did not "abandon" bag when he threw it on car when police officers approached him and thus did not lose reasonable expectation of privacy with regard to it; defendant was at most only two steps away from bag at any time and defendant attempted to prevent officer from seizing bag.

6. Searches and Seizures ⇐45

Search of defendant's bag contemporaneously with his arrest was justified by need to prevent destruction of evidence of crime; bag was within defendant's easy reach, and although police officer lawfully seized bag, he had not, at time defendant reached out in attempt to prevent such seizure, reduced bag to his exclusive control and thus, danger of defendant obtaining bag and destroying all or part of its contents was still present. U.S.C.A. Const. Amend. 4.

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1 On the evening of June 19, 1987, Sergeant Geoff Thomas and Detective John L. Edwards, both employed by the Ashland Police Department, were preparing to go on a gambling raid. Before the gambling raid operation began, the officers drove their car through the streets of the area.

While doing so, the officers observed two males, Danny Smith, appellant herein, and Steve Holmes, leaving the residence of Wilma Balducci. Smith was holding in his hand a brown sack, commonly used to carry groceries, which was folded closed at the top. The officers described his method of carrying the sack as "gingerly." Neither officer knew either of the two men.

After exiting the Balducci residence and walking down the street, while being observed by the officers, appellant and his companion entered the parking lot of a nearby YMCA and walked toward a vehicle parked in the lot. The officers, meanwhile, turned into the parking lot and pulled up behind the vehicle that appellant had approached.

Thomas exited the unmarked police vehicle from the passenger side and started to approach appellant, asking appellant to "* * * come here a minute." Appellant did not respond and kept walking. At that point, Thomas identified himself as a police officer. Appellant, who was by now alongside the car near the front of the driver's side door, threw the sack he was carrying onto the hood of the car and turned to face Thomas who was approaching appellant. Thomas continued walking toward the car and sack, and the officer asked appellant what the sack contained. Appellant did not respond. As Thomas reached for the sack, appellant tried to block Thomas' hand. Thomas pushed appellant's hand away, opened the sack and ascertained its contents. He discovered a four-beam scales, a weighing pan bearing a white powder residue, later determined to be cocaine, and a piece of paper used to package cocaine, commonly referred to as a "coke seal." Thomas then asked appellant how much cocaine was in the sack. According to Thomas, appellant replied that the sack contained about two grams of cocaine.

Thereupon, appellant was advised that he was under arrest and was transported to the police station. Appellant was given *Miranda* warnings and subsequently chose to make a statement. Appellant admitted that the scales, cocaine and cocaine seal were his.

On July 31, 1987, an indictment was returned against appellant charging him with one count of violating R.C. 2925.11(A), drug abuse, a felony of the fourth degree. Appellant entered a plea of not guilty at his arraignment.

On August 13, 1987, appellant, through counsel, filed a motion to suppress, contending that all evidence against appellant was obtained as a result of an illegal search and seizure and that all statements

...de by appellant constituted the fruits of ...e illegal search. Following a suppression ...aring, the trial court overruled appel...nt's motion.

Appellant subsequently changed his plea ...om not guilty to no contest. The court ...ccepted the plea and found appellant ...uilty. Execution of appellant's sentence ...as suspended pending appeal.

On appeal, appellant raised as error the trial court's overruling of his motion to suppress. The court of appeals found no error and affirmed the judgment of the trial court and remanded the cause for execution of sentence. After a timely filed notice of appeal, this court granted appellant's motion for leave to appeal. Execution of appellant's sentence was again stayed pending appeal.

Robert P. DeSanto, Pros. Atty., and Ramona J. Rogers, for appellee.

Stephen Cockley, Mansfield, and David Homer, Albany, N.Y., for appellant.

HOLMES, Justice.

The issue presented in this case is whether the search and seizure of appellant's bag was reasonable within the Fourth Amendment to the United States Constitution, and Section 14, Article I of the Ohio Constitution, which mirrors that amendment. For the reasons which follow, we answer such query in the affirmative, and thus affirm the court of appeals.

Three events occurred in this case which must be analyzed in light of the Fourth Amendment: (1) the encounter between appellant and Officer Thomas, (2) Thomas' seizure of the brown paper bag, and (3) Thomas' search of that bag.

I

[1] No "seizure" of the person of appellant occurred in this case, prior to the discovery of the contraband and appellant's subsequent arrest. It is well established that "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio* (1968), 392 U.S. 1, 19, at fn. 16, 88 S.Ct. 1868, 1879, at fn. 16, 20 L.Ed.2d 889 "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Id.* at 34, 88 S.Ct. at 1886 (White, J., concurring). In *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, the court reaffirmed its position, taken in *Terry, supra*, and *Sibron v. New York* (1968), 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917, and detailed the degree of restraint necessary to invoke constitutional safeguards:

"We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. [Footnote omitted.] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall, supra*, 446 U.S. at 554, 100 S.Ct. at 1877.

The court made it clear that "[a]s long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Id.* It is *not enough* "to establish a seizure that the person asking the question was a law enforcement official," *id.* at 555, 100 S.Ct. at 1877, nor does it matter that the person is not expressly told by the official that he is free to decline to answer questions. *Id.* In *Florida v. Royer* (1983), 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229, a plurality of the court, seven Justices, reaffirmed these principles as to when a seizure occurs. *Id.* at 497–498, 523, 103 S.Ct. at 1323–24, 1337. See, also, *Immi-*

gration & Naturalization Service v. Delgado (1984), 466 U.S. 210, 215–217, 104 S.Ct. 1758, 1762–63, 80 L.Ed.2d 247.

In *Mendenhall*, the respondent, Sylvia Mendenhall, was observed by two federal Drug Enforcement Administration ("DEA") agents as she arrived at the Detroit Metropolitan Airport on a flight from Los Angeles. Mendenhall's behavior appeared to the agents to fit a "drug courier profile," so the agents approached her, identified themselves as federal agents and asked to see her identification and airline ticket, which she produced. Mendenhall answered further questions posed by the agents, and after the agents identified themselves as federal narcotic agents, Mendenhall became visibly nervous. The DEA agents returned her identification and ticket to her, and asked her to accompany them to the airport DEA office. Mendenhall complied and later consented to a search of her person and her handbag. Mendenhall removed two small packages from her undergarments, one of which contained heroin, and she was *then* arrested for possession of heroin. *Id.* 446 U.S. at 547–549, 100 S.Ct. at 1873–74. In upholding the denial of Mendenhall's motion to suppress, Justice Stewart reviewed these facts and stated: "[N]othing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure."[1] *Id.* at 555, 100 S.Ct. at 1877. The court also held that Mendenhall voluntarily consented to accompany the agents to the DEA office, *id.* at 558, 100 S.Ct. at 1879, and she freely and voluntarily consented to the search of her person, *id.* at 559–560, 100 S.Ct. at 1879–80.

Having set forth these rather simple concepts of when a "seizure" within the meaning of the Fourth Amendment occurs, a review of the facts in this case reveals that, as in *Mendenhall*, a reasonable person in appellant's position would have believed he was free to leave at any time, prior to his actual arrest following the discovery of contraband. Officers Thomas and Edwards, with combined law enforcement experience of over fifteen years, observed appellant and his companion emerge from the Balducci residence and, for reasons discussed in Part II, *infra*, became suspicious of their behavior as they entered the YMCA parking lot. The plain-clothes officers, in their unmarked cruiser, pulled up behind the car appellant was approaching and Thomas asked appellant what was in his bag. Appellant did not answer. Thomas got out of the car and said, "hey, come here a minute" to appellant, who looked over his shoulder and kept walking towards the car. Thomas then verbally identified himself as a police officer. The appellant turned towards Thomas, threw the brown paper bag onto the hood of the car and

1. Then Justice Rehnquist joined in this conclusion. The Chief Justice and Justices Powell and Blackmun concurred in the judgment, but felt it was not proper to reach the issue of whether the initial stop by the agents constituted a seizure within the meaning of the Fourth Amendment, since neither of the lower courts had considered the question. The concurring Justices assumed, however, that the stop constituted a seizure, and concluded that it was a reasonable investigative stop not offensive to the Fourth Amendment. Justice Powell, writing for the concurring Justices, concluded:

"* * * The public interest in preventing drug traffic is great, and the intrusion upon respondent's privacy was minimal. The specially trained agents acted pursuant to a well-planned, and effective, federal law enforcement program. They observed respondent engaging in conduct that they reasonably associated with criminal activity. Furthermore, the events occurred in an airport known to be frequented by drug couriers. [Footnote omitted.] In light of all of the circumstances, I would hold that the agents possessed reasonable and articulable suspicion of criminal activity when they stopped the respondent in a public place and asked her for identification.

"The jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures. *In applying a test of 'reasonableness,' courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience.*" (Emphasis added.) *Mendenhall, supra*, at 565–566, 100 S.Ct. at 1882–83. See, also, Part II, *infra*.

ed back from the car.[2]

ly these two officers, in plain clothes, e present (Edwards had radioed their tion and was approaching appellant's panion as Thomas approached appel- O. Neither officer displayed his weap- nor had Thomas physically touched ap- ant at that time. Thomas, who was the y person to speak, at no time used a reatening tone of voice, did not order pellant into the cruiser at any time, and ver stated or indicated anything to the ffect that if appellant did not come toward e officer he would be under arrest.

Thus, none of the examples indicating a eizure enumerated in *Mendenhall, supra*, t 554, 100 S.Ct. at 1877, was present in this case, nor are any other circumstances present such that "a reasonable person would have believed that he was not free to leave." *Id.* In fact, appellant testified at the suppression hearing that he did not feel compelled to go towards Thomas when he identified himself as a police officer, and corroborated the facts that he had not been spoken to harshly or threatened with arrest, no weapon had been displayed to him, and he stated that the officers' cruiser was not blocking his exit from the YMCA parking lot.

The facts presented in this case are indistinguishable from those presented in *Mendenhall*, and we decline to adopt appellant's theory that any encounter between a citizen and the police, once the law enforcement officer has identified himself and asks a question of the citizen, constitutes a "seizure" within the Fourth Amendment.

"* * * [C]haracterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. 'Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes v. Washington*, 373 U.S. 503, 515 [83 S.Ct. 1336, 1344, 10 L.Ed.2d 513].'" *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, at 225, 93 S.Ct. 2041, at 2046, 36 L.Ed.2d 854, quoted in *Mendenhall, supra*, 446 U.S. at 554, 100 S.Ct. at 1877.[3] No seizure of appellant's

2. Both officers testified at the suppression hearing that appellant *threw* the bag onto the hood of the car. Appellant's own testimony was contradictory. On direct examination, the appellant stated:

"Q. And then what happened next?

"A. He asked me again, and then he said he was a police officer, and by then, I put the bag on top of the hood of the car.

"Q. Did you throw the bag?

"A. I didn't exactly throw it. I sort of set it up there.

"Q. And then what did you do?

"A. Walked back towards him, which by then, he was about like three, four feet from me."

On cross-examination, the following exchange took place:

"Q. Isn't it a fact that you threw the bag on the trunk to attempt to disassociate yourself with [*sic*] the cocaine?

"A. No, not really. I didn't throw it on the trunk. I threw it on the hood.

"Q. If you threw it on the hood, isn't it a fact that you threw it on the hood to disassociate yourself from what you knew was cocaine in that bag?

"A. No.

"Q. Why did you throw it on the hood?

"A. I just sat [*sic*] it up there to go see what he wanted."

The trial court, in its findings of fact, specifically found that "[w]hen Sgt. Thomas identified himself as a police officer, the Defendant threw the brown grocery bag away from himself and onto the hood of his car and stepped backwards away from the bag * * *." It is axiomatic that "[o]n the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus.

3. Consider the following observations from *Terry v. Ohio, supra*, 392 U.S. at 13–15, 88 S.Ct. at 1875–76:

"The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some cir-

person, within the meaning of the Fourth Amendment, occurred in this case.

II

[2, 3] Of course, the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, *and effects*, against unreasonable searches and seizures." (Emphasis added.) In general, a seizure of personal property, such as the bag carried by appellant here, is considered *per se* unreasonable within the Fourth Amendment unless it follows from a judicial warrant issued upon probable cause and particularly describing the item to be seized. See *Marron v. United States* (1927), 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231. Absent a warrant, but where law enforcement officials have probable cause to believe that a container, such as appellant's bag, holds contraband or evidence of a crime, the item may be seized—pending issuance of a warrant to search—"If the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." *United States v. Place* (1983), 462 U.S. 696, 701, 103 S.Ct. 2637, 2641, 77 L.Ed.2d 110.

In *Place*, however, the United States Supreme Court went a step further and recognized as reasonable under the Fourth Amendment the temporary, warrantless seizure of personal property (luggage, in that case) in an intermediate, *Terry*-type situation, i.e., a seizure on the basis of reasonable, articulable suspicion, premised on objective facts, that such property contains contraband or evidence of a crime. *Place, supra*, at 702, 103 S.Ct. at 2642. The court recognized that the "articulable suspicion" exception to the probable-cause requirement recognized in *Terry* and its progeny rests on the balance of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id.* 462 U.S. at 703, 103 S.Ct. at 2642. Noting that "'[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit,'" *id.*, quoting *Mendenhall, supra*, 446 U.S. at 561, 100 S.Ct. at 1881 (Powell, J.), and that "seizures of property can vary in intrusiveness," *id.* 462 U.S. at 706, 103 S.Ct. at 2644, the *Place* court opined that "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that [such] strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime." *Id.* at 706, 103 S.Ct. at 2644.

As the court explained in *United States v. Cortez* (1981), 449 U.S. 411, 417–418, 101 S.Ct. 690, 694–95, 66 L.Ed.2d 621:

"Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances—*the whole picture*—must be taken into account. Based upon that whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. * * *

"The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, *the assessment must be based upon all of the circumstances.* The analysis proceeds with various objec-

texts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. * * * Doubtless some police 'field interrogation' conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. * * *

* * * * [A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. * * * *

observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—*inferences and deductions that might well elude an untrained person.*

"*The process does not deal with hard certainties, but with probabilities.* Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. *Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.*

"The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. * * *" (Emphasis added.) See, also, *United States v. Jacobsen* (1984), 466 U.S. 109, 121–122, 104 S.Ct. 1652, 1660–61, 80 L.Ed.2d 85.

[4] Applying these rudiments of Fourth Amendment jurisprudence to the facts of this case, it is evident that Officer Thomas, far from having the inarticulate hunch perceived by appellant, possessed sufficient objective facts to support a particularized articulable suspicion that the bag carried by appellant contained contraband.

During the suppression hearing, both officers testified as to their prior law enforcement experience, including drug arrests by Thomas and the circumstances they observed prior to seizing appellant's bag. While preparing to go on a gambling raid, they observed appellant and his companion emerge from the home of Wilma Balducci, whom the officers knew to be a convicted felon (for forgery), out on probation. The officers also knew that approximately six months prior to that time the Ashland County Sheriff's Department had executed a warrant to search the Balducci residence and that drug paraphernalia had been found as a result of such search. In addition, Thomas testified that he had received recent tips from informants that Balducci had been dealing in drugs, and neighbors of Balducci had complained of heavy traffic in and out of her residence. Officer Edwards testified that he had spoken to a witness in an earlier investigation who stated Balducci had purchased property in exchange for cash and drugs.

Coupled with these suspicions regarding the Balducci residence, the officers observed appellant carrying the closed grocery bag down at his side, keeping it level and, as testified by Edwards, appellant "was walking kind of gingerly with it." Thomas testified to several prior investigations and arrests in which the suspects carried drugs or narcotics in this fashion. Finally, as the officers approached to investigate, appellant abruptly disassociated himself from the bag as he, with a mumbled curse, threw the bag onto the hood of the car and backed away from it. Obviously, none of these observations, *standing alone*, would give rise to an articulable suspicion that the bag contained contraband. It was the culmination of all these observations which led Thomas to reasonably believe that appellant's bag contained narcotics,[4] and thus he was permitted, under the principles of *Terry* and its progeny,

4. In *United States v. Mendenhall*, *supra*, 446 U.S. at 563–564, 100 S.Ct. at 1882, Justice Powell, in the plurality opinion observed:

"* * * [I]t is important to recall that a trained law enforcement agent may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer.' * * * Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices. *Law enforcement officers may rely on the 'characteristics of the area' and the behavior of a suspect who appears to be evading police contact. United States v. Brignoni-Ponce*, 422 U.S. 873, 884–885 [95 S.Ct. 2574, 2581–82, 45 L.Ed.2d 607]. 'In all situations the officer is entitled to assess the facts in light of his experience.' *Id.*, at 885 [95 S.Ct. at 2582]." (Emphasis added.) See, also, *State v. Bobo* (1988), 37 Ohio St.3d 177, 179–180, 524 N.E.2d 489, 492.

to detain the bag briefly to investigate further the circumstances that aroused his suspicion. See *Place, supra*, 462 U.S. at 706, 103 S.Ct. at 2644. "Indeed, *Terry* itself involved 'a series of acts, each of them perhaps innocent' if viewed separately, 'but which taken together warranted further investigation.' 392 U.S., at 22 [88 S.Ct., at 1880] * * *." *United States v. Sokolow* (1989), 490 U.S. ——, ——, 109 S.Ct. 1581, 1587, 104 L.Ed.2d 1, 12.

In *Sokolow*, decided just five months ago by a compelling seven-to-two majority, the court held that DEA agents had a reasonable suspicion that Sokolow was transporting illegal drugs when they stopped him at Honolulu Airport, based on the agent's belief that Sokolow's behavior was consistent with one of the DEA's "drug courier profiles."[4] The court noted, *id.* at ——, 109 S.Ct. at 1586, 104 L.Ed.2d at 11, that "[a]ny one of these [profile] factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think *taken together* they amount to reasonable suspicion." (Emphasis added.)

The officers' suspicions here were clearly articulated at the suppression hearing, and were supported by objective facts. Thus, the seizure of appellant's bag was reasonable under the Fourth Amendment.

III

[5] Finally, we conclude that the search of appellant's bag contemporaneous with his arrest was justified by the need to prevent the destruction of evidence of the crime.[5] In *United States v. Chadwick* (1977), 433 U.S. 1, 14–15, 97 S.Ct. 2476, 2485, 53 L.Ed.2d 538, the court detailed the justifications for searches "incident to [an] arrest":

"* * * When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, *and to prevent the loss of evidence*, it has been held reasonable for the arresting officer to conduct a prompt, warrantless 'search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' *Chimel v. California* [1969], 395 U.S. [752], 763 [89 S.Ct. 2034, 2040, 23 L.Ed.2d 685] * * *.

"Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *United States v. Robinson*, 414 U.S. 218 [94 S.Ct. 467, 38 L.Ed.2d 427] (1973); *Terry v. Ohio, supra*. However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' *Preston v. United*

3. "When respondent was stopped, the agents knew, *inter alia*, that (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage." *Sokolow, supra*, at ——, 109 S.Ct. at 1583, 104 L.Ed.2d at 7–8.

4. We do not adhere to the view taken by the lower courts to the effect that appellant had "abandoned" the bag when he threw it on the car and thus no longer retained any reasonable expectation of privacy with regard to it. Appellant was, at most, only two steps away from the bag at any time, and the evidence presented at the suppression hearing is clear that appellant physically attempted to prevent Officer Thomas from seizing the bag. Thus, in our view, appellant had not "'voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could not longer retain a *reasonable* expectation of privacy with regard to it at the time of the search.'" (Emphasis added.) *State v. Freeman* (1980), 64 Ohio St.2d 291, 297, 18 O.O.3d 472, 476, 414 N.E.2d 1044, 1048, quoting *United States v. Colbert* (C.A.5, 1973), 474 F.2d 174, 176.

United States, 376 U.S. [364], at 367 [84 S.Ct. [881], at 883, 11 L.Ed.2d 777], or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their *exclusive control*, and [when] there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." (Emphasis added.) See, also, *Terry*, *supra*.

The court in *Chimel v. California*, *supra*, 395 U.S. at 763, 89 S.Ct. at 2040, was straightforward:

"* * * [I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. * * * There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

[6] The search here was neither remote in time nor place from appellant's arrest. Furthermore, the bag was still within appellant's easy reach. Although Thomas lawfully seized the bag, he had not—at the time appellant reached out in attempt to prevent such seizure—reduced the bag to his "exclusive control." The danger of appellant obtaining the bag and destroying all or part of its contents was still present, and thus the search was warranted.

For all of the foregoing reasons, we affirm the judgment of the court of appeals, upholding the denial of appellant's motion to suppress.

Judgment affirmed.

MOYER, C.J., and RESNICK, J., concur.

DOUGLAS, J., concurs in judgment.

SWEENEY, WRIGHT and HERBERT R. BROWN, JJ., dissent.

DOUGLAS, Justice, concurring in judgment.

While I concur in the judgment of the majority, I write separately to express my great concern with the concept of the majority that a person, stopped by police officers who have identified themselves as such, is "* * * free to leave at any time, prior to his actual arrest * * *." The majority, somewhat naively I think, indicates that appellant was free to ignore the officers' commands because the officers did not display their weapons, did not physically touch appellant, and did not use a threatening tone of voice or order appellant into the cruiser.

Under the majority's scenario on this point, one can only wonder what action the officers would have taken and what would have happened to appellant had he continued to keep control of his sack and proceeded to run from the officers and the vicinity. Is it not reasonable to assume that there would have been other charges, such as a resisting arrest charge?

My point in writing is that I do not believe the highest court of this state should be saying in writing that citizens are free to ignore the orders of police officers just because the officer has not taken one of the actions described in the majority opinion. For us to give judicial approval to this is naive at best—and could be disastrous at worst. It will be interesting to see how we will rule when next we get a case where a citizen ignores a police officer's directions, runs or walks away, and then is pursued and apprehended with contraband.

Result-oriented jurisprudence should be avoided even when it appears to be the "right" thing to do.

SWEENEY, Justice, dissenting.

By its opinion today, the majority has not only misconstrued the precedents it cites to supposedly support its untenable ruling, but it has ignored the clear language of the federal and state guarantees of freedom from unreasonable or unlawful warrantless searches and seizures as em-

bodied in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution (hereinafter collectively referred to as the "Fourth Amendment"). Accordingly, I must strongly dissent from the decision rendered in this case.

The majority's tortuous path used to arrive at what appears to be a predetermined result is filled with misinterpretations of the state of the law as announced by the United States Supreme Court concerning the validity of any particular search and seizure.

The majority's first point, i.e., that the appellant was not "seized" by Officer Thomas, seems to be based more on wishful thinking than on coherent constitutional analysis. The majority relies heavily on *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, for the proposition that the instant appellant was not "seized" by the police. However a careful review of *Mendenhall* compels an opposite conclusion. In *Mendenhall, supra*, the Supreme Court developed what can be characterized as a "reasonable person" standard to determine whether a seizure has taken place under a particular set of facts. The court therein held that a seizure of the person could only occur when, in view of all circumstances, a reasonable person would believe that he or she was not free to leave. *Id.* at 554, 100 S.Ct. at 1877. In *Mendenhall*, the facts indicate that defendant was stopped by federal agents on an airport concourse and was asked to show some identification. Eventually, defendant consented to a search which led to a discovery of narcotics on her person and she was arrested. The court in *Mendenhall* opined that a reasonable person in defendant's position would have felt free to leave under the circumstances. *Id.* at 555, 100 S.Ct. at 1877.

In contrast, it is clear that under the circumstances, the appellant herein could only reasonably believe that he was not free to leave when requested to stop by the officer. After Officer Thomas requested appellant to stop, he quickly and forcibly seized the appellant's personal property (the paper grocery bag and its contents). Under such circumstances, there is no logical basis for holding that a reasonable person in appellant's position was free to leave. The nonconsensual seizure of appellant's property is the aspect which clearly distinguishes the instant cause from *Mendenhall, supra*. In *Mendenhall*, the defendant's property was not seized until after she had consented to a search; whereas, here, the appellant never had time to consent to a search or to answer any pertinent questions. While Officer Thomas did identify himself as a police officer, his hasty seizure of appellant's grocery bag was done in total disregard of appellant's rights under the Fourth Amendment, because such a seizure of personal property by the officer effectively removed from appellant his freedom to leave, inasmuch as appellant had exerted a privacy and possessory interest in the contents of the grocery bag.

The majority, in a fallacious attempt to justify the officer's action, has completely misapplied the rule of law in *Mendenhall*. Of crucial relevance to the instant cause is the fact that the appellant's property was seized and searched *prior to his arrest*. In *Mendenhall*, however, there was a consent to a search which led to an arrest. To say that the appellant here was free to leave even after the officer had seized his personal property is absurd, and *Mendenhall, supra*, does not support such a conclusion.

Even if it were to be assumed that appellant was not "seized" for the purposes of the Fourth Amendment, it is clear that he was at least unlawfully detained. In *Brown v. Texas* (1979), 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, the high court recognized that a police officer may briefly detain a suspect even though the officer does not have probable cause to believe that the suspect is involved in criminal activity. However, the court in *Brown* stated that the officer must at least have a reasonable suspicion, based on objective facts, that the person being detained is involved in criminal activity. *Id.* at 51, 99 S.Ct. at 2640. While the rule of law in *Brown* may be characterized as lenient, its application to

the instant factual situation compels a finding that the detention of appellant was in clear violation of his Fourth Amendment rights.

First of all, the officers here apparently relied on unsubstantiated reports that the house from which appellant had left was a "drug house." Second, Officer Edwards implied that since appellant was carrying the paper bag "gingerly," he suspected that appellant was carrying drugs. In my view, such reasoning is not by any means an objective view of the facts. There are countless items that one may put in a grocery bag that must be carried "gingerly." Hence, it seems clear that the officers had no reasonable suspicion that appellant was involved in criminal activity of a type that would justify the detention of appellant that occurred here.

Even assuming, *arguendo*, that the officers were justified in detaining appellant, the seizure and search of appellant's bag was clearly and unmistakably undertaken in violation of his Fourth Amendment rights. The majority's "analysis" of the search and seizure has the ultimate effect of disposing of appellant's Fourth Amendment freedoms in their entirety. While the majority cites many cases that purportedly justify a seizure of personal property, closer scrutiny reveals that none of the cited cases even remotely justifies what was done in the case at bar. In fact, I challenge the majority to name one United States Supreme Court case that permits an officer to conduct a search of personal property without a warrant, and then arrest the person based on the fruits of the warrantless/illegal search. Of course, no holding based on facts similar to the instant cause has been upheld by the United States Supreme Court because such a holding would totally fly in the face of the precise language of the Fourth Amendment.

Under the Fourth Amendment, a search and seizure of personal property is almost always unconstitutional unless the officer has obtained a judicial warrant to search and seize such personal property. See *Marron v. United States* (1927), 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231. In the instant cause, there is no question that the officer did not obtain such a warrant. Likewise, there is no question that appellant exerted a privacy and possessory interest in the grocery bag when the officer reached for it. Nevertheless, there are two narrowly circumscribed exceptions to the warrant requirement. One is where it is reasonable for an officer to believe that the arrestee will attempt to seize or destroy relevant evidence over which the *arrestee* may have control. *Chimel v. California* (1969), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685. The court in *Chimel* also observed that the second exception to the warrant requirement is where the officer searches the *arrestee* in order to protect his own life. *Id.* at 762-763, 89 S.Ct. at 2039-40. See, also, *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. In *Terry, supra*, the court held that an officer could search an individual for weapons under certain circumstances. Obviously, *Terry* is in no way dispositive of the instant case. Here, the officer did not make an arrest prior to the search, and there is no indication that appellant was carrying a weapon or that the officer had any suspicion whatsoever that the appellant was carrying a weapon.

Upon a review of the facts *sub judice*, it is obvious that the majority's reliance on *Chimel* in order to justify the instant search is grossly misplaced and somewhat disingenuous. Unlike the instant cause, the defendant in *Chimel* was arrested *prior to* the search's taking place. In turning the *Chimel* holding on its head, the majority, in essence, places all Ohio citizens under "martial law" because under the majority's decision, a police officer may search one's person or personal property with impunity prior to placing the person under arrest. Such a rule of law is repugnant to a truly free and open society, and should never be countenanced by this court.

In any event, since the warrantless search conducted in this cause does not even come close to falling under any of the recognized exceptions to the Fourth Amendment requirements, the decision below must be reversed. The holding

reached by the majority also clashes head-on with a number of other opinions by the United States Supreme Court. In *Recznik v. Lorain* (1968), 393 U.S. 166, 89 S.Ct. 342, 21 L.Ed.2d 317, the police had information that a particular apartment building was a gambling house, and the senior officer stated that he knew when he entered the apartment that he did not have enough evidence to make an arrest. *Id.* at 169, 89 S.Ct. at 344. Of course, the high court held that the police did not have probable cause to conduct a search of the apartment building. Similarly, in the instant cause, Officer Thomas admitted to his partner that he did not have enough evidence to detain appellant, let alone arrest him. Thomas only became suspicious of appellant because he saw him leaving what was believed to be a "drug house."

In applying *Recznik* to other aspects of the instant facts, it is apparent that the search of appellant's bag was not based upon "probable cause" that a crime was being committed. Thomas knew he did not have enough evidence to arrest appellant prior to searching the bag, but used the fruits of the illegal search as a justification for the subsequent arrest. Therefore, I am perplexed as to how the majority could misread the law in order to justify what was clearly an illegal search. Undoubtedly, the majority's *ex post facto* justification of the instant search is based wholly on the fact that illegal drugs were found in appellant's bag. However, it takes no citation of authority to understand that an illegal search is an illegal search regardless of whether the fruits recovered as a result are illegal drugs or everyday grocery products.

In another respect, the majority attempts to justify the unwarranted intrusion by the officers here by manufacturing a third exception to the warrant requirement. The majority cites *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110, for the proposition that the high court has created another exception to the warrant requirement. However, a careful reading of the *Place* opinion does not reveal such an expansive interpretation as proposed by the majority. In *Place*, *supra*, the Supreme Court recognized that personal property which is reasonably believed to hold contraband or evidence of a crime may be temporarily detained. *Id.* at 706, 103 S.Ct. at 2644. Nevertheless, the *Place* court held that *before the personal property can be searched or permanently seized, a warrant must be issued.* *Id.* at 701, 103 S.Ct. at 2641. Once again, the majority contorts a precedent in a manner that is either careless, disingenuous or flat-out incorrect. To characterize the conduct of the officer in the instant cause as one sanctioned by *Place*, *supra*, is at best a severe misinterpretation of that holding, because such a misinterpretation reduces the Fourth Amendment to a mere "form of words." See *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 328, 25 OBR 360, 384, 496 N.E.2d 925, 949 (Sweeney, J., dissenting).

Last, it must be reemphasized that an illegal search cannot be transformed into a constitutionally permitted one simply because illegal drugs are obtained as the fruits of the search. As aptly noted by Chief Justice (then Judge) Moyer in *State v. Hassey* (1983), 9 Ohio App.3d 231, at 236, 9 OBR 403, at 409, 459 N.E.2d 573, at 580:

"Facts acquired after a stop cannot provide justification for the stop."

The "ends justifies the means" analysis employed by the majority should not be endorsed by this court at the expense of fundamental liberties that are to be enjoyed by all the citizenry. The rights embodied in the Fourth Amendment are much too precious to be tossed aside merely to sustain the conviction rendered below. While we as a society must endeavor to deal with the scourge of illegal drugs in a quick and effective manner, we must never sanction a solution that dispenses with the constitutional guarantees and personal liberties that have made ours the most enduring government on the face of the Earth.

Accordingly, I would reverse the decision of the court of appeals below, and thereby reaffirm the Fourth Amendment and the freedoms it is intended to protect.

HERBERT R. BROWN, J., concurs in the foregoing dissenting opinion.

WRIGHT, Justice, dissenting.

We are facing a plague in our land as a result of drug abuse. The reaction of our leaders to this plague has been dramatic and in the main appropriate. However, the stability of American society rests on the fact that we are a nation of laws. The courts are sworn to defend our most fundamental laws—the state and federal Constitutions.

The majority well nigh concedes that appellant's Fourth Amendment rights were violated, but shrugs this intrusion off because of the greater value of stern law enforcement with respect to the war against trafficking in dangerous drugs. Such an approach is foreign to sound constitutional jurisprudence. I would point to the true rule regarding the adherence to constitutional principles as expressed in *Ex parte Milligan* (1886), 71 U.S. (4 Wall.) 2, 18 L.Ed. 281[7] which was decided in the context of national peril and public unrest far greater than exists today. In refusing to ignore the force and effect of the plain English words used by our ancestors in framing the Constitution and the provisions of the Bill of Rights in particular, the United States Supreme Court stated:

"* * * Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. *The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.* No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." (Emphasis added.) *Id.* at 120–121.

Likewise, the words of Judge Campbell, writing for the Supreme Court of Michigan in *People ex rel. Twitchell v. Blodgett* (1865), 13 Mich. 127, are applicable in this situation:

"* * * [S]pecific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of the Government, until they are amended or abrogated by the action prescribed by the authority which created them." *Id.* at 139.

The Fourth Amendment is but one of the ten amendments constituting the Bill of Rights. The securities for personal liberty embodied in the Bill of Rights "were such as wisdom and experience had demonstrated to be necessary for those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified." *Ex parte Milligan, supra,* at 120.

The Fourth Amendment states:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no War-

7. In *Ex parte Milligan* (1886), 71 U.S. (4 Wall.) 2, the court granted a writ of habeas corpus holding that, absent martial law, a citizen of a non-rebel state was entitled to all the protections afforded by the Constitution. The petitioner had been sentenced to death for treason by a military tribunal in Indiana.

rants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The people of Ohio, to doubly ensure their rights in this regard, adopted an almost identically worded provision in Article I, Section 14 of the Ohio Constitution. See, also, R.C. 2933.22.

Into these provisions were poured the living and sometimes bitter experiences of our forefathers struggling for independence from an unyielding and unfeeling despot. They realized the inherent temptation and persistent dangers of power. The simple words of the Fourth Amendment have an everyday importance and application that is as valid today as it always has been.

"'We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate[2] between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.... And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.'" *Chimel v. California* (1969), 395 U.S. 752, 761, 89 S.Ct. 2034, 2039, 23 L.Ed.2d 685 (quoting *McDonald v. United States* [1948], 335 U.S. 451, 455–456, 69 S.Ct. 191, 193, 93 L.Ed. 153).

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Mincey v. Arizona* (1978), 437 U.S. 385, 395, 98 S.Ct. 2408, 2414, 57 L.Ed.2d 290 (quoting *Johnson v. United States* [1948], 333 U.S. 10, 13–14, 68 S.Ct. 367, 368–69, 92 L.Ed. 436).

Finally, the Fourth Amendment applies to "people, not places," *Katz v. United States* (1967), 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, and absent some special exception all containers and packages in one's possession will receive full protection of the Fourth Amendment. *United States v. Ross* (1982), 456 U.S. 798, 822, 102 S.Ct. 2157, 2171, 72 L.Ed.2d 572. So when defendant Smith walked out of a private residence, during daylight on a summer evening, carrying a paper grocery bag, he was shielded by the protections of the Fourth Amendment, and the burden is on the state to show the need to search defendant's bag without a warrant to do so. *United States v. Jeffers* (1951), 342 U.S. 48, 51, 72 S.Ct. 93, 96 L.Ed. 59.

The fact that defendant was merely carrying a grocery bag at his side with the top rolled down does not invalidate his privacy interest in that container. The central purpose of the Fourth Amendment forecloses distinctions between types of containers. "For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler [or anyone else] who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case." (Footnote *omitted*.) *United States v. Ross, supra*, 456 U.S. at 822, 102 S.Ct. at 2171.

The facts in this case are that the police officers, without sufficient objective facts concerning *this particular defendant* to raise *any reasonable suspicion whatsoever*, stopped the defendant to question him

Then, with no probable cause to justify an arrest, and without the defendant's consent, the officers searched a closed container belonging to the defendant. Based upon what was found in the illegal search of the container, the officers arrested the defendant. Only at that time, according to the majority, was the defendant "seized" for purposes of the Fourth Amendment. This posture is, in my view, specious at best.

The majority at first finds no seizure under the Fourth Amendment and then finds probable cause sufficient to [unjustify] an arrest of the defendant without a warrant. These findings purportedly are based upon the fact that defendant "threw" his closed grocery bag onto the hood of his car, and then tried to block an Ashland police officer's arm when the officer reached for the bag. In the words of Sergeant Thomas, this was what occurred after he asked Smith what was in the bag:

"Q. Did he make any response when you asked him what he had in the bag?

"A. Not right away.

"Q. What happened then?

"A. I started reaching for the bag, and he attempted to block my hand.

"Q. Then what happened?

"A. I pushed his hand away, and I unrolled the top of the bag.

"MR. COCKLEY: Excuse me. Your testimony was that you pushed his hand away?

"A. Yes.

"Q. And then what did you do?

"A. I unrolled the top of the bag.

"Q. As you pushed his hand away, did you say anything to him?

"A. What do you have in the bag?

"Q. Then what did he say?

"A. Then he said there's just a set of scales in there.

"Q. When you opened the bag, what did you see?

"A. The top of the four-beam scales."

The majority would characterize this encounter as a permissible police encounter in a public place rather than a justifiable *Terry*-type detention. One authority has suggested that a permissible encounter between the police and a member of the public becomes a seizure "if the officer engages in conduct which a reasonable man would view as threatening or offensive even if performed by another private citizen." 3 LaFave, Search and Seizure (1987) 413, Section 9.2(h). I submit that a reasonable man would construe the grabbing of his possession as an offensive gesture. Therefore, the cases construing *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, are applicable in this case.

The encounter occurred after the officers stopped to question the defendant on no more than an "inchoate and unparticularized suspicion of 'hunch' " that the defendant was involved in criminal activity. *Terry v. Ohio*, *supra*, at 27, 88 S.Ct. at 1883. Such hunches cannot be the basis of a stop authorized by *Terry*, *Id.* at 30, 88 S.Ct. at 1884. See *United States v. Sokolow* (1989), 490 U.S. ——, 109 S.Ct. 1581, 104 L.Ed.2d 1. The officers did not know the defendant or his companion who were merely exiting a private residence on a June evening when it was still light. The only "suspicious" behavior was the defendant's carrying of a grocery bag while exiting from a residence where the authorities suspected drugs had been sold on an undefined former date.

The mere exiting from a house where suspected drug dealing might have occurred, without more, simply cannot be sufficient justification to stop and search someone and his possessions. To hold otherwise destroys almost everyone's right to privacy in his or her person. Even if a stop and a frisk for weapons under *Terry*, *supra*, is justified, a search of a closed container may not be justified. One court in granting a defendant's motion to suppress stated:

"[A *Terry*] frisk is only justified by an *officer's regard for his personal safety*, not by his interest in discovering contraband." (Emphasis added.) *United States v. Gonzalez* (S.D.N.Y.1973), 362 F.Supp. 415, 423. The court went on to hold that

even if a frisk had been justified with respect to an accused who had been observed in the company of a "notorious narcotics [w]dealer" in an area of "intense narcotics activity" the notoriety of the traffic[w]er could not be imputed to the accused and the ensuing search of a brown paper bag carried by the accused exceeded the scope of a justified frisk. *Id.* at 421.

Most of the cases cited by the majority involving a "stop for questioning" concerned stops conducted by trained officers in an airport. Justice Powell in *Florida v. Royer* (1983), 460 U.S. 491, 108 S.Ct. 1319, 75 L.Ed.2d 229, stated in his concurring opinion that "[i]n view of the extent to which air transportation is used in the drug traffic," such a stop "warrants special consideration." *Id.* at 508, 103 S.Ct. at 1330.

The suggestion is that law enforcement concerns are especially strong in airports, and I agree. However, *this* case involves the citizens of Ohio as they walk around their own neighborhoods. Moreover, the facts in this case do not even satisfy the rationale and requirements found in the airport search cases. In *Royer, supra; United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497; *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110, and *United States v. Sokolow, supra*, the officials did not initiate the stop for questioning of any of the defendants on as flimsy a factual record as here. There were many more articulable facts to support each of the initial stops.[8] Most significant is the fact that *none* of these cases held that [w]the circumstances providing justification for

8. All these cases involved the use of a "drug profile" to identify travellers who can be subjected to questioning or a *Terry* stop by drug enforcement agents. In *United States v. Mendenhall* (1980), 446 U.S. 544, 547, 100 S.Ct. 1870, 1873, 64 L.Ed.2d 497, the facts that supported the reasonable suspicion to stop the defendant were: "(1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, 'appeared to be very nervous,' and 'completely scanned the whole area where [the agents] were standing'; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit."

In *Florida v. Royer* (1983), 460 U.S. 491, 493, fn. 2, 103 S.Ct. 1319, 1322, fn. 2, 75 L.Ed.2d 229, the court stated:

"* * * In Royer's case, the detectives['] attention was attracted by the following facts which were considered to be within the profile: (a) Royer was carrying American Tourister luggage, which appeared to be heavy, (b) he was young, apparently between 25-35, (c) he was casually dressed, (d) he appeared pale and nervous, looking around at other people, (e) he paid for his ticket in cash with a large number of bills, and (f) rather than completing the airline identification tag to be attached to checked baggage, which had space for a name, address, and telephone number, he wrote only a name and the destination. * * *"

In *United States v. Place* (1983), 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110, these facts were thought relevant by officials, as set forth in the district court's decision:

"1. Defendant Place was departing from a 'source city.'

"2. Defendant systematically scanned the immediate area in the lobby in which he was standing and looked very closely at each person that was seated or standing in that area.

"3. Defendant noticed and paid close attention to Mr. McGovock when he left the line.

"4. Defendant stared directly at the detectives two or three times as the detectives moved around the lobby.

"5. When buying his ticket and checking his baggage, the defendant turned and looked over his shoulder to scan the lobby once again.

"6. Defendant paid for his ticket in cash.

"7. After leaving the ticket counter and heading toward the gate from which he was to depart, defendant stopped for no apparent reason, turned around to look at anyone who might be behind him, and headed back to the lobby from where he had just come.

"8. Upon reaching the lobby, defendant Place walked a full circle around the lobby while looking back over his shoulder continuously to see if he was being followed." *United States v. Place* (E.D.N.Y.1980), 498 F.Supp. 1217, 1224.

Finally, in *United States v. Sokolow* (1989), 490 U.S. ——, ——, 109 S.Ct. 1581, 1583, 104 L.Ed.2d 1, 7-8, these facts were considered relevant: "(1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage."

the original stop were sufficient to establish the probable cause necessary to arrest the suspects or to search luggage.[9]

The legality of the searches in *Royer* and *Mendenhall*, *supra*, depended upon the validity of the accused's consent since there were insufficient facts to otherwise provide probable cause to search his luggage. In *Royer*, the court held that the consent purportedly obtained was involuntary, that the search of Royer's luggage was therefore illegal, and that drugs found therein could not be used to provide the probable cause for his arrest. Conversely, in *Mendenhall*, the court held that the search was legal because the defendant had consented and that the contraband found could constitute probable cause to arrest. The facts in this case do not support any possible argument that the defendant consented to the seizure and search of his bag.[10]

In *Place* and *Sokolow*, *supra*, the probable cause to search the defendants' luggage and arrest the defendants was provided by a narcotics dog alerting to the luggage. The court in *Place* held 462 U.S. at 707, 103 S.Ct. at 2644 that a dog's sniffing of luggage is *sui generis* and is not a "search" within the meaning of the Fourth Amendment. The court in *Place* stated:

"The purpose for which respondent's luggage was seized, of course, was to arrange its exposure to a narcotics detection dog. Obviously, if this investigative procedure is itself a search requiring probable cause, *the initial seizure of respondent's luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause.* * * *" (Emphasis added and citations omitted.) *Place*, *supra*, at 706, 103 S.Ct. at 2644. See, also, *Sokolow*, *supra*, 460 U.S. at ——, 109 S.Ct. at 1584, 104 L.Ed.2d at 9.

Once the dogs alerted, the drug agents in *Place* and *Sokolow* did what they should have done—they went to a neutral, detached magistrate and obtained a warrant to search the luggage. *Sokolow*, *id.*; *Place*, *supra*, 462 U.S. at 699, 103 S.Ct. at 2640. The court in *Place* held that "the limitations applicable to investigative de-

9. As the plurality opinion in *Royer* stated in discussing the parameters of a permissible search of luggage:

* * * First, it is unquestioned that *without a warrant* to search Royer's luggage and *in the absence of probable cause and exigent circumstances*, the validity of the search depended on Royer's purported consent. Neither is it disputed that where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. * * *

"Second, law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. * * * Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. * * * The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. * * * He may not be detained even momentarily without reasonable, objective grounds for doing so; *and his refusal to listen or answer does not, without more, furnish those grounds.* * * * If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." (Emphasis added and citations omitted.) *Royer*, *supra*, 460 U.S. at 497–498, 103 S.Ct. at 1323–24.

The opinion went on to discuss the *Terry* exception, which allows the detention of a person or his possessions upon less than probable cause "if there is articulable suspicion that a person has committed or is about to commit a crime. * * * [A] temporary detention for *questioning* [is justified] on less than probable cause where the public interest involved is the suppression of illegal transactions in drugs or of any other serious crime." (Emphasis added.) *Id.* at 498–499, 103 S.Ct. at 1324–25.

10. I agree with the majority's rejection of the court of appeals' view that the defendant "abandoned" his bag. In addition to *State v. Freeman* (1980), 64 Ohio St.2d 291, 18 O.O.3d 472, 414 N.E.2d 1044, see *United States v. Jackson* (C.A.9, 1976), 544 F.2d 407 (defendant was held not to have abandoned his suitcase when he dropped it and walked three steps away from it after officials addressed him), and *United States v. Sevides* (N.D.Ill.1987), 665 F.Supp. 686 (defendant held not to have abandoned his expectation of privacy when he placed his suitcase in the trunk of a car which he then followed in a second car).

tentions of the person should define the permissible scope of all investigative detention of the person's luggage on less than probable cause." *Place, supra*, at 709, 103 S.Ct. at 2645. Because the officials held the luggage for too long before obtaining a warrant to search, the search was illegal and Place's conviction was reversed. *Id.* at 710, 103 S.Ct. at 2646.

Finally, the reliance upon *Chimel v. California* (1968), 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685, is misplaced, as the circumstances presented therein are notably different from those in this case. *Chimel* addressed the scope of a warrantless search *incident to a lawful arrest*. Because the arrest in *Chimel* was pursuant to an *arrest warrant* presumedly issued by a neutral, detached magistrate and based upon probable cause, the court stated, "we proceed on the hypothesis that the California courts were correct in holding that the arrest of the petitioner was valid under the Constitution." *Id.* at 755, 89 S.Ct. at 2035-36. Nevertheless, the search in *Chimel* was too broad and was held to violate the Fourth Amendment.

As the Supreme Court previously stated, "[A] search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause." *Henry v. United States* (1959), 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134. "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Id.* "To repeat, an arrest is not justified by what the subsequent search discloses." *Id.* at 104, 80 S.Ct. at 172. *Rawlings v. Kentucky* (1980), 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633; *Johnson v. United States* (1948), 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436; *Commonwealth v. Trenge* (1982), 305 Pa.Super. 386, 403, 451 A.2d 701, 710, fn. 8.

As stated, there were insufficient facts to justify a *Terry* stop in this case. The refusal of the defendant in this case to answer the officer's question or to surrender his bag did not provide grounds for a *Terry* detention of the defendant or a taking of his bag, and certainly did not provide probable cause for an arrest. All the circumstances must be considered and each case is fact-specific. However, no case is cited by the majority where similarly diffuse facts with respect to the accused were held to provide probable cause for a warrantless arrest or issuance of a warrant by a neutral, detached magistrate. The case law is, I submit, contrary to the majority's position. See *State v. Gruddy* (1978), 56 Ohio St.2d 132, 9 O.O.3d 100, 378 N.E.2d 723; *State v. Haynes* (1971), 25 Ohio St.2d 264, 54 O.O.2d 379, 267 N.E.2d 787; *State v. Joseph* (1971), 25 Ohio St.2d 95, 54 O.O.2d 228, 267 N.E.2d 125; *Henry, supra*; *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; compare with *Draper v. United States* (1959), 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327; *United States v. Gomez* (C.A.5, 1985), 776 F.2d 542; *United States v. Wiseley* (C.A.9, 1985), 757 F.2d 969; *United States v. Evers* (D.C.Md.1985), 616 F.Supp. 1145. See, generally, Annotation (1971), 6 A.L.R. Fed. 724.

In *Royer*, the state argued that there was probable cause to arrest the defendant even without a valid consent to the search. The court gave short shrift to that argument and stated, "We cannot agree with the State, if this is its position, that every nervous young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge." *Royer, supra*, 460 U.S. at 507, 103 S.Ct. at 1329. Likewise, in this case, a man exiting a private residence, carrying a closed grocery bag "gingerly" and then placing or even throwing the bag on the hood of his car as he turns to face a police officer, has done nothing that creates probable cause to arrest him. Absent the probable cause to arrest him or a warrant based upon probable cause, the officer had no authority to open the bag, which was "seized" for Fourth Amendment purposes as soon as the officer pushed the defendant's arm away and grabbed the bag.

Nor is the state entitled to assert any of the other exceptions to the warrant requirement before searching defendant's bag, such as the automobile exception (see *United States v. Ross* [1982], 456 U.S. 798, 809–813, 102 S.Ct. 2157, 2164–67, 72 L.Ed.2d 572); the plain view exception (see *Coolidge v. New Hampshire* [1971], 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564); or any other exigent circumstance.

The actions of the safety forces in this case may have been well intentioned, but what this case is about is whether their actions violated appellant's constitutional rights. In the words of Justice Sutherland, dissenting in *Home Bldg. & Loan Assn. v. Blaisdell* (1934), 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, "[t]he only legitimate inquiry we can make is whether it is constitutional. * * * If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." *Id.* at 483, 54 S.Ct. at 256. I am prepared to endure the "pinch" in this case, and thus I must respectfully dissent.

HERBERT R. BROWN, J., concurs in the foregoing dissenting opinion.

45 Ohio St.3d 288

HULETT et al., Appellants,

v.

HULETT, Appellee.

No. 88-98.

Supreme Court of Ohio.

Submitted Feb. 21, 1989.

Decided Sept. 20, 1989.

Parties sued for divorce and for determination of paternity of child born during marriage. The Court of Common Pleas, Franklin County, granted wife's motion for partial summary judgment, and husband appealed. The Court of Appeals reversed and remanded. On motion to certify record, the Supreme Court, Sweeney, J., held that statutory presumption of paternity accorded to mother's husband may be rebutted with evidence of genetic test results, and is not limited to evidence showing lack of sexual relations between parties.

Reversed and remanded.

Herbert R. Brown, J., concurred in judgment and filed opinion, in which Wright and Resnick, JJ., joined.

1. Children Out-of-Wedlock ⇐3

Man is presumed to be natural father of child born during his marriage to mother, but such presumption may be rebutted by clear and convincing evidence to contrary. R.C. § 3111.03(A)(1).

2. Children Out-of-Wedlock ⇐3

Statutory presumption of paternity accorded to mother's husband may be rebutted by any of methods enumerated in statute, including submission of genetic test results, and is not rebuttable only by evidence showing lack of sexual relations between parties. R.C. §§ 3111.03(A)(1), 3111.10.

3. Statutes ⇐223.2(1)

Statute regarding presumption of paternity accorded mother's husband was in pari materia with other statutes regarding evidence admissible in paternity proceedings, such that statutes had to be construed together. R.C. §§ 3111.02–3111.04, 3111.09, 3111.10.

Syllabus by the Court

1. Pursuant to R.C. 3111.03(A)(1), a man is presumed to be the natural father of a child where the man and the child's mother are or have been married to each other and the child is born during the marriage. However, such presumption may be rebutted by clear and convincing evidence to the contrary. (*Johnson v. Adams* [1985], 18 Ohio St.3d 48, 18 OBR 83, 479 N.E.2d 866, approved and followed.)

Q Do you recall whether or not you had your headlights on on the police car?

A No, there weren't any headlights on.

Q Describe for the Court the two men that you saw physically, that is, in their dress, coming out of Balducci's house.

A One of the white males we later identified as Danny Smith was wearing a black T-shirt. It had the Jack Daniel's insignia on it, blue jeans, had long brown hair.

Q What about the other individual?

A The other individual we later identified him as Steve Holmes. He was wearing a white T-shirt and blue jeans.

Q Did either of the two men that came out of Balducci's have anything in their possession that you could see?

A Yes, Danny Smith had this -- well, that brown paper bag. He was carrying it.

Q Would you say that brown paper bag -- what type, for the Record, bag are we talking about? Was it a lunch-size bag, a grocery-size bag?

A A full-size grocery-size grocery bag. It has Kash N Karry printed on the side and also "Loaded with low

prices" on the side.

Q Describe to the Court the fashion in which Danny Smith was carrying this grocery bag.

A He was carrying it -- the top was rolled up, and he was carrying it so it was hanging down to his side. It wasn't swinging. It was just kind of a level-type carry.

Q Was he supporting the underside of the bag with his other hand?

A No.

Q And the top of the bag, it's your testimony, was rolled down?

A That's correct.

Q Did it appear to you from what you were able to observe that there was anything in the bag?

A Yes.

Q Now, throughout your years of police experience, have you seen other individuals carrying grocery bags of the nature that you've described?

A Yes.

Q Throughout the course of your criminal investigations in your 11 years as a police officer, has it been your

case law reads with regard to these cases indicates that the intent of the officer is an important part of the consideration here.

THE COURT: You may answer.

Overruled.

A If Mr. Smith would have got into his car and left, there really wouldn't have been a whole lot I could have done. I couldn't have arrested. I wouldn't have had grounds at that point.

Q Have you had any discussion specifically with Detective Edwards about what you were going to do in the event he did get in the car and pull away?

A Yes.

Q When was the discussion and what was the discussion between you and Edwards?

A Detective Edwards says what if he doesn't let you look in the bag? I said, Oh, well. Then he walks.

Q When did you have this discussion, you two?

A This is when we were still in our unmarked car. We were right around the turnaround there at Roepke. It was at that point in time.

MRS. ROGERS: I have nothing further of

There's a phone booth here. The YMCA is over in this area here.

Q From the position that you pulled your car into that lot, did you block Danny Smith's exit from his vehicle?

A No.

Q From the moment you got out of that car, it was your intention to go for the bag, wasn't it?

A It was my intention to get Danny Smith to stop.

Q Why?

A To ask him what was in the bag.

Q Why did you want to ask him what was in the bag?

A To see if he would answer me.

Q And what if he didn't?

A Then I wouldn't have had much choice.

Q But he didn't give you permission to look in the bag, did he?

A Not verbally, no.

Q Not physically, either, because he attempted to block you from grabbing his bag, did he not?

A He did attempt to block me.

Q Not withstanding that, you grabbed the bag anyhow, and you proceeded to look inside it?

A That's correct.

MR. COCKLEY: That's all I have.

THE COURT: Redirect.

REDIRECT EXAMINATION OF GEOFF THOMAS

BY MRS. ROGERS:

Q Sergeant Thomas, before the Defendant made the furtive movement of throwing the bag behind --

MR. COCKLEY: Objection to "furtive movement", Your Honor. There's been no testimony he made any "furtive movement".

THE COURT: Sustained.

Q Prior to the time the Defendant threw the bag on the hood of the car and stepped away from him, had you made any attempt to reach for that bag or open it?

A No.

Q Did you feel you had any right to open that bag before the time that he threw it on the hood and backed away from it?

A At that time, no.

Q Mr. Cockley stated that Wilma Balducci merely had a paraphernalia arrest. Is it a criminal offense to have drug paraphernalia?

much after that.

Q But the Defendant continued walking?

A Yes.

Q Picking up from the point where the bag has been thrown and the Defendant has backed away from the bag, what did anybody say next or do next?

A Sergeant Thomas approached the bag, and he was -- he reached to look into the bag, and Danny Smith put his hand in front of Sergeant Thomas, about here on the chest, being like this.

Sergeant Thomas deflected him away from him. Told him just to stay, you know, just stay where he was.

Q After he had deflected the Defendant's attempt to stop him from reaching for the bag, what did Thomas do then?

A He looked into the bag.

Q What conversation, if any, do you remember next?

A Sergeant Thomas was looking into the bag. Danny Smith said, It's just a set of scales.

Q Did Thomas make any response?

A The next thing Sergeant Thomas said is how much coke

A No.

Q Did you subsequently determine that?

A Yes.

Q And who did it belong to?

A Danny Smith.

Q After the point in time when you and Detective Thomas had sighted the two men coming out of the Balducci residence with the bag, do you remember any conversation specifically about what Detective Thomas intended to do if the Defendant didn't converse with him or answer his questions or statements?

A He said that he wanted to attempt to talk to them, and I said, What if they say there's nothing in the bag? And he said, Well, it can't hurt to try.

Q Did he indicate to you that if the Defendant didn't respond as to what was in the bag whether or not he intended to arrest him?

A He couldn't arrest him.

Q Did he say that to you, or did you two discuss that?

A He said if he walks then he walks.

MRS. ROGERS: I have nothing further, Judge.

ORIGINAL

Supreme Court, U.S.
FILED
DEC 19 1989
JOSEPH F. SPANIOL, JR.
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NO. 89-5999

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANNY SMITH,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

RECEIVED
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ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT P. DESANTO
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QUESTIONS PRESENTED FOR REVIEW

I. DOES A FOURTH AMENDMENT SEIZURE OCCUR WITHOUT AN INTENTIONAL GOVERNMENTAL TERMINATION OF A PERSON'S FREEDOM OF MOVEMENT?

II. MAY A LAW ENFORCEMENT OFFICER APPROACH A CITIZEN ON THE STREET WITHOUT SEIZING THAT PERSON FOR FOURTH AMENDMENT PURPOSES?

III. DOES THE FOURTH AMENDMENT PROTECT PROPERTY WHICH HAS BEEN DISCARDED OR ABANDONED DURING A STREET ENCOUNTER BETWEEN A PLAIN CLOTHES POLICE OFFICER AND A PERSON WHERE THE OFFICER DOES NOTHING MORE THAN IDENTIFY HIMSELF, ASK A QUESTION OF THE PERSON AND THE PERSON APPROACHED DOES NOT FEEL THAT HE HAS BEEN RESTRAINED IN ANY WAY?

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NO. 89-5999

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANNY SMITH,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported in 45 Ohio St. 3d 255 (1989). Errata in the official advance sheets have been corrected and the corrected opinion reported in 544 N.E. 2d 239. In addition, the opinion is adequately set forth in the petition. The opinions of the Ohio Court of Appeals for the Fifth Appellate District and the opinion of the trial court, the Court of Common Pleas for Ashland County, Ohio are adequately set forth in the petition.

JURISDICTION

Jurisdiction is claimed by petitioner under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fourth and Fourteenth Amendments are adequately set forth in the petition.

STATEMENT OF THE CASE

Petitioner Smith was charged by grand jury indictment with one count of drug abuse, a possessory offense, in violation of Ohio Revised Code 2925.11(A). Petitioner had been observed by two Ashland, Ohio undercover police officers as he and a companion exited the home of Wilma Balducci, a third party suspected of involvement in illegal drugs. Balducci was on probation following a felony conviction for forgery. At the time, officers were aware that a search warrant had been executed at Balducci's home resulting in the seizure of drug paraphernalia. In addition, the officers had received tips from informants that Balducci had been dealing in drugs and had purchased property for cash and drugs. Neighbors had complained of heavy traffic in and out of Balducci's residence. As the officers watched, petitioner crossed the street carrying in one hand a grocery bag with the top rolled over. Petitioner carried the bag "gingerly", with his right hand held low as if to avoid moving the contents. The officers had previously observed persons carrying illegal drugs in a similar fashion.

In an unmarked car, the plain clothes officers followed petitioner as he walked toward a parking lot. One officer called to petitioner, asking him to "come here a minute." Petitioner did not respond and continued walking. After parking the car, the officer identified himself. Petitioner continued on, threw the bag on the hood of a car, then turned and stepped away from the bag. The plain clothes officer approached the bag which petitioner had thrown on the car hood. As he reached for the bag, petitioner attempted to block the officer's hand. The bag was opened disclosing a set of scales, a paper wrapping used to package cocaine and some white powder. When the officer asked petitioner how much cocaine was in the bag, petitioner replied that it contained two grams of the drug. Petitioner was arrested at that point.

Petitioner moved to suppress the contents of the bag on Fourth Amendment grounds. Respondent urged, inter alia, there was no seizure of petitioner until after the contents of the bag had been

discerned. Respondent argued that when petitioner threw the bag toward the car and stepped away, petitioner no longer had a reasonable expectation of privacy in the bag or its contents.

The trial court found as historic fact that there was no seizure of petitioner during the initial encounter and that petitioner had thrown the bag away from himself and stepped away from it as the officer approached. The state court of appeals concluded that by throwing the bag and stepping away from it, petitioner had attempted to disassociate himself from the bag, and therefore did not retain a reasonable expectation of privacy in its contents.

The Ohio Supreme Court upheld the seizure of the bag on other grounds. The court did not adhere to the finding of abandonment reached by the lower courts but concluded that there was a reasonable, articulable basis for seizure of the bag and examination of the bag was necessary to avoid destruction of its contents.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THERE WAS NO FOURTH AMENDMENT SEIZURE OF PETITIONER UNTIL PROBABLE CAUSE FOR ARREST HAD DEVELOPED.

Not all police encounters with citizens amount to a seizure of the person. Terry v. Ohio, 392 U.S. 1 (1968). A person is seized for Fourth Amendment purposes "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 555 (1980).

The test assesses the coercive effect of police conduct, taken as a whole, rather than focusing on particular details in isolation. Michigan v. Chesternut, 486 U.S. 569, (1988). A Fourth Amendment seizure occurs only when there is governmental termination of freedom of movement through means intentionally applied. Brower v. County of Inyo, 489 U.S. ___, 109 S. Ct. 1378 (1989).

Testifying at the hearing on his motion to suppress evidence, petitioner agreed that when the officer called to him, he felt free to continue walking. This was true even after the officer had identified himself. The plain clothes officer did not present weapons, use a threatening tone of voice or display any other indicia that petitioner was not free to continue on his way. The state courts reached this conclusion. Petitioner was not seized until after probable cause for his arrest had developed.

2. THERE WAS REASONABLE ARTICULABLE SUSPICION TO SUPPORT THE OFFICER'S APPROACH OF PETITIONER.

The principles announced in Terry v. Ohio, 392 U.S. 1, (1968), permit investigative intervention with a citizen's freedom of movement upon reasonable suspicion of criminal activity. The reasonableness of the intrusion must be viewed through the eyes of a trained law enforcement officer who may draw inferences an untrained civilian would miss. United States v. Cortez, 449 U.S. 411 (1981). The assessment of the reasonableness of such an intrusion must be based upon all of the circumstances. United States v. Sokolow, __ U.S. ___, 109 S.Ct. 1581 (1989)

In petitioner's case, the undercover officers had a legitimate basis for suspecting that petitioner was engaged in unlawful activity. Petitioner was observed leaving a house in which drug paraphernalia had been discovered pursuant to a search warrant. Informants and neighbors respectively had advised law enforcement officers that Balducci was a drug dealer and that there was a high level of traffic in and out of the house. Petitioner was carrying a rolled down paper bag in a manner in which the experienced undercover officers had observed narcotics carried in past investigations. There were sufficient articulable reasons to support a reasonable suspicion that petitioner was engaged in criminal activity thereby permitting the officers to approach and seek to temporarily detain the bag. Law enforcement officers may rely on the behavior of a suspect who appears to be evading police contact. United States v. Brignoni-Ponce, 422 U.S. 873 (1974).

3. BY THROWING THE PAPER BAG AND STEPPING AWAY AS OFFICERS APPROACHED, PETITIONER NO LONGER HELD A REASONABLE EXPECTATION OF PRIVACY IN THE BAG OR ITS CONTENTS.

No Fourth Amendment seizure of petitioner had occurred when the plain clothes detective approached petitioner and identified himself as a police officer. Michigan v. Chesternut, supra. When petitioner discarded the bag and contents as the officer approached, the officer was free to take the object into his possession. Hester v. United States, 265 U.S. 57 (1924).[1] No command was given which might have caused petitioner to relinquish the bag.

That which is abandoned is no longer protected by the Fourth Amendment. See e.g., Abel v. United States, 362 U.S. 217 (1960). Abandonment is a question to be determined from all of the circumstances. Such determination by the trier of fact should be accorded deference by a reviewing court. Petitioner's act of throwing the bag and disassociating himself from it as Officer

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[1] The trial court as trier of fact specifically found that petitioner threw the bag away from himself and stepped away. These findings of historic fact are entitled to great deference by reviewing courts. See Sumner v. Mata, 449 U.S. 539, (1981).

NO. 89-5999

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANNY SMITH,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

AFFIDAVIT OF SERVICE

State of Ohio,
County of Ashland, SS:

Robert P. DeSanto, being first duly sworn says that he is eligible and has made application for admission to the Bar of the Supreme Court of the United States; that he is counsel for respondent in the above captioned case, SMITH v. OHIO, No. 89-5999; that pursuant to Rule 28.5(C) of the Rules of Practice of this Court, affiant served a copy of the foregoing Respondent's Brief in Opposition upon petitioner, Danny Smith, by mailing a copy to the office of petitioner's counsel of record, Max Kravitz, at his place of business, Capital University Law School, 665 South High Street, Columbus, Ohio 43215, by United States Mail, First Class, postage prepaid on the 19th day of December, 1989.

Further, affiant states that all parties required to be served have been served.

Robert P. DeSanto
Prosecuting Attorney

SWORN to before me and subscribed in my presence this 19th day of December, 1989.

Notary Public

My Commission Expires 7-25-93.

NO. 89-5999

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANNY SMITH,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

AFFIDAVIT OF MAILING

State of Ohio,
County of Ashland, SS:

Robert P. DeSanto, being first duly sworn says that he is eligible and has made application for admission to the Bar of the Supreme Court of the United States, that he is counsel for respondent in the above captioned case, SMITH v. OHIO, No. 89-5999; that pursuant to Rule 28.2 of the Rules of Practice of this Court, on December 14th, 1989, affiant caused ten (10) copies of the Respondent's Brief in Opposition to be deposited in the United States Post Office, Ashland, Ohio, with first class postage prepaid, addressed to the Clerk of the Supreme Court of the United States. Further that respondent was served with a copy of the petition on November 20, 1989 and to affiant's knowledge, this mailing was done within the permitted time for the filing of Respondent's Brief in Opposition.

Robert P. DeSanto
Prosecuting Attorney

SWORN to before me and subscribed in my presence this 14th day of December, 1989.

Notary Public

My commission expires 7-1-93

Thomas approached was properly viewed by the trial court as an abandonment of petitioner's privacy interest therein.[2] Hester v. United States, supra. No Fourth Amendment seizure of either petitioner or the bag took place. See Michigan v. Chesternut, supra and Brower v. County of Inyo, supra.

It is respectfully submitted that the writ of certiorari should not issue in this case.

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[2] Both the trial and intermediate appellate courts reached this conclusion. The Ohio Supreme Court declined to adhere to the view taken by the lower courts. However, respondent is free "to defend its judgement on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by (the lower courts)." Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n. 20 (1979). Respondent has consistently urged abandonment in the courts below.

CONCLUSION

No unreasonable search or seizure within contemplation of the Fourth Amendment took place below. For the reasons advanced, respondent respectfully requests that the writ of certiorari not issue in this case.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

DANNY SMITH *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 89-5999. Decided March 5, 1990

PER CURIAM.

This case raises the single question whether a warrantless search that provides probable cause for an arrest can nonetheless be justified as an incident of that arrest. A divided Ohio Supreme Court answered that question in the affirmative, reasoning that the search was neither remote in time nor place from the arrest. We disagree.

Petitioner was approached by two plainclothes officers of the Ashland, Ohio, Police Department on a June evening as he and a companion exited a private residence and entered the parking lot of a YMCA. The officers were driving in an unmarked police vehicle. Petitioner was carrying a brown paper grocery bag with the words "Kash 'n Karry" and "Loaded with Low Prices" printed on the outside in a manner that the officers later described as "gingerly." Neither officer knew petitioner or his companion. One of the two officers, Officer Thomas, exited the vehicle and, without identifying himself, asked petitioner to "'come here a minute.'" 45 Ohio St. 3d 255, 256, 544 N. E. 2d 239, 240 (1989). Petitioner did not respond and kept walking. When Officer Thomas identified himself as a police officer, petitioner "threw the sack he was carrying onto the hood of [his] car and turned to face Thomas who was approaching." *Ibid.* Officer Thomas asked petitioner what the bag contained; petitioner did not respond; Officer Thomas then rebuffed petitioner's attempt to protect the bag, pushed petitioner's hand away and opened the bag. The drug paraphernalia discovered within provided probable cause for the arrest and

evidence sufficient to support petitioner's conviction for drug abuse.

No contention has been raised in this case that the officer's reaching for the bag involved a self-protective action necessary for the officer's safety. See *Terry* v. *Ohio*, 392 U. S. 1 (1968). Although the Fourth Amendment may permit the detention for a brief period of property on the basis of only "reasonable, articulable suspicion" that it contains contraband or evidence of criminal activity, *United States* v. *Place*, 462 U. S. 696, 702 (1983), it proscribes—except in certain well-defined circumstances—the search of that property unless accomplished pursuant to judicial warrant issued upon probable cause. See, *e. g.*, *Skinner* v. *Railway Labor Executives Assn.*, 489 U. S. ——, —— (1989); *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978); *Katz* v. *United States*, 389 U. S. 347, 357 (1967). That guarantee protects alike the "traveler who carries a toothbrush and a few articles of clothing in a paper bag" and "the sophisticated executive with the locked attaché case." *United States* v. *Ross*, 456 U. S. 798, 822 (1982). The Ohio Supreme Court upheld the warrantless search of petitioner's bag under the exception for searches incident to arrest. See *United States* v. *Chadwick*, 433 U. S. 1, 14–15 (1977); *Chimel* v. *California*, 395 U. S. 752, 763 (1969). The court stated that petitioner was not arrested until after the contraband was discovered in the search of the bag. 45 Ohio St. 3d, at 257, 258, 544 N. E. 2d, at 241, 242. It nonetheless held that the search was constitutional because its fruits justified the arrest that followed.

That reasoning, however, "justify[ing] the arrest by the search and at the same time . . . the search by the arrest," just "will not do." *Johnson* v. *United States*, 333 U. S. 10, 16–17 (1948). As we have had occasion in the past to observe, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron* v. *New York*, 392 U. S. 40, 63 (1968); see also *Henry* v. *United States*, 361 U. S. 98, 102 (1959); *Rawlings* v. *Ken-*

tucky, 448 U. S. 98, 111, n. 6 (1980). The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. Contrary to the Ohio Supreme Court's reasoning, it does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows.

The State does not defend the reasoning of the Ohio Supreme Court, but rather contends that petitioner abandoned the bag when he threw it on his car and turned to face Officer Thomas. See *Abel* v. *United States*, 362 U. S. 217, 241 (1960); *Hester* v. *United States*, 265 U. S. 57, 58 (1924). That argument was unanimously rejected by the Ohio Supreme Court, 45 Ohio St. 3d, at 263, n. 6, 544 N. E. 2d, at 246, n. 6; *id.*, at 266, 544 N. E. 2d, at 249 (Sweeney, J., dissenting); *id.*, at 273–274, 544 N. E. 2d., at 255, n. 10 (Wright, J., dissenting), and we have no reason to disturb its conclusion. As the state court properly recognized, a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned that property. Cf. *Rios* v. *United States*, 364 U. S. 253, 262, n. 6 (1960).

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted and the judgment of the Supreme Court of Ohio is

Reversed.

SUPREME COURT OF THE UNITED STATES

DANNY SMITH *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 89-5999. Decided March 5, 1990

JUSTICE MARSHALL, dissenting.

Although I agree that the limited information before us appears to indicate that the Ohio Supreme Court erred in its decision below, I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and significantly increase the risk of an erroneous decision. See *Pennsylvania* v. *Bruder*, —— U. S. ——, —— (1988) (MARSHALL, J., dissenting); *Rhodes* v. *Stewart*, —— U. S. ——, ——(1988) (MARSHALL, J., dissenting); *Buchanan* v. *Stanships*, 485 U. S. 265, 269–270 (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7–8 (1987) (MARSHALL, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the judgment below.